Supreme Court
(1) F I L E D
25-102 JUN 5 1995

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1994

ALMA TORREBLANCA DE AGUILAR, ET AL.,
Petitioners,

v.

THE BOEING COMPANY, ET AL.,
Respondent.

Petition For Writ of Certiorari

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Petitioners

QUESTIONS PRESENTED

The petitioners, who are representatives of estates of decedents who were killed in an air crash in Mexico, brought suit in the state court of Texas on behalf of the estates and, in their petition filed in the state court, expressly alleged that they did not, and would not, seek any recovery greater than $50,000.00 per decedents' estate, exclusive of costs and interest. They attached to their state court pleadings the affidavit of one of their lawyers in which the lawyer, on behalf of the petitioners, stipulated that the petitioners were irrevocably waiving any and all rights to claim damages in excess of $50,000.00 per estate and agreeing that such stipulation constituted an irrevocable judicial admission and

limitation upon the amount of recovery. The petitioners also filed, after removal, the affidavit of a Mexican lawyer, who, as also one of the petitioners' counsel swore that the named representatives in the state court petition had, under Mexican law, the authority to represent the estates in question and to bind them to the stated limitations upon their recoveries. The defendants removed to federal court; the federal district court denied petitioners' motion to remand; and the court then dismissed petitioners' suit on ground of forum non conveniens. The Fifth Circuit Court of Appeals affirmed and held that a removing party has a right to assert federal removal jurisdiction despite the presence of express pleadings, affidavits and

stipulations limiting the amount of recovery to less than the jurisdictional minimum.

The above situation presents one overall question, with subsidiary parts, for review: Did the holding in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586 (1938) - that "(i)f (a plaintiff) does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove" - permit the federal court to collaterally attack the pleadings, stipulations and affidavits in this case; to attack the authority of the attorneys and representatives of the various estates to make binding stipulations as to the

amount of the suit; and to grant federal removal jurisdiction based simply upon the contention that the petitioners claims were really worth more than $50,000 each and petitioners did not have the right to waive any portion of their actual claims in order to have their cases disposed of in the state court system.

The holding of the Fifth Circuit in this case is in conflict with the decision of the Tenth Circuit in *Laughlin v. K-Mart Corporation*, 50 F. 3d 871 (10th Cir. 1995) and numerous other decisions of other circuit and district courts (it is petitioners understanding that counsel for K-Mart, the losing party in the *Laughlin* case, is going to file a petition for writ of certiorari by the end of July, 1995 and such case will be

very much "related" to this case and the issues to be decided in both).

Therefore, we respectfully submit that the importance of the issue presented, relating as it does to federalism, comity, removal/remand law, and other extremely important areas of American law, and the need for uniformity with respect to the decisions of the courts of appeals and district courts, make the grant of the petition for writ of certiorari in this case imperative.

LIST OF PARTIES

Petitioners/Appellants/Defendants

Benton Musslewhite
Mitchell Toups
Dennis C. Reich
Alma Torreblanca de Aguilar and All of the Plaintiffs Listed on App. 4.

Respondents/Appellees/Plaintiffs

The Boeing Company

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Goodyear Tire & Rubber Company

Gerald L. Bracht
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EASTHAM, WATSON, DALE & FORNEY
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808 Travis
Houston, TX 77002-0769

Parker Hannifin Corporation

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THE BOEING COMPANY
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Petition For Writ of Certiorari
To United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Alma Torreblanca de Aguilar, et al, file this petition and brief to urge the Court to grant certiorari and review the question presented, and would show this Honorable Court as follows:

OPINIONS BELOW

A. The opinion of the U.S. Circuit Court of Appeals for the Fifth Circuit, concerning which Writ of Certiorari is sought in this case, can be found at 47 F.2d 1404 (5th Cir. March 7, 1995) and is reproduced as Appendix C, A30 to A77.

B. The opinion of the federal district court, denying petitioners motion to remand, is reproduced as Appendix A, A1 - A27.

C. The opinion of the federal district court, dismissing this case on ground of forum non conveniens, is reproduced as Appendix B, A28 to A29.

JURISDICTION

The Court has jurisdiction to review a final judgment of a court of appeals pursuant to 28 U.S. C. § 1254 (1). The final judgment of the court of appeals

was entered on March 7, 1995. No petition for rehearing was filed.

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves 28 U.S.C. Section 1332 providing for removal in diversity cases from state court to federal court if the amount in controversy exceeds $50,000.00 exclusive of costs and interest. This statute has been reproduced and is attached as Appendix F, A126 - A128.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On March 31, 1986, a Mexicana Airlines jet crashed near Mexico City, killing everyone on board. An investigation concluded that a tire exploded in the wheel well while the plane was in flight, causing an in-flight fire that eventually caused the plane to explode.

Relatives and personal representatives of the estates of those who died in that crash filed several lawsuits throughout the United States and in Mexico. In every lawsuit filed in the United States, the action has been either voluntarily dismissed by the petitioners or dismissed by the federal courts on the basis of foreign sovereign immunity or forum non conveniens.[1]

In November 1992, petitioners, as the personal representatives of the estates of each decedent and the legal heirs of the decedents, filed an action

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[1] See de Aguilar, v. Boeing Co., 11 F.3d 55 (5th Cir. 1993); Compania Mexicana de aviacion, S.A. v. United States Dist. Court, 859 F.2d 1354 (9th Cir. 1988); Rodriquez v. Mexicana de Avion, S.A., (W.D. Tex. 1987), aff'd mem., 843 F.2d 498 (5th Cir.), cert. denied, 488 U.S. 826 (1988); Wolf v. Boeing Co., 810 P. 2d 943 (Wash. App.), review denied, 818 P.2d 1098 (Wash. 1991).

in the Texas state court seeking wrongful death and survival damages. The petitioners charged state-law negligence and products liability against Boeing, B.F. Goodrich, Goodyear Tire & Rubber, Delta Airlines and Parker Hannifin Corporation. The amount of damages were not specified because, under the Texas rules, theoretically the petitioners could only allege that "the damages sought are within the jurisdictional limit of the court." See Tex. R. Civ. P. 47.

After defendants removed the case to federal court in the Eastern District of Texas, petitioners filed affidavits executed by certain petitioners and by the petitioners' attorneys, expressly limiting the damages they were seeking, and moved to remand on the ground that

the $50,000 jurisdictional amount requirement of 28 U.S.C. Sect. 1332 was not satisfied. The district court denied remand, holding that the affidavits were irrelevant because "jurisdiction attaches at the time of removal, and subsequent events do not oust the court of jurisdiction." *de Aguilar v. Boeing Co.*, 790 F. Supp. 693, 694 (E.D. Tex. 1992). Subsequently, however, the Fifth Circuit decided *Asociacion Nacional de Pescadores v. Dow Quimica de Colombia S.A.*, 988 F. 2d 559 (5th Cir. 1993), cert. denied, 114 S. Ct. 685 (1994) ("ANPAC"), concluding that post-removal affidavits sometimes can be relevant where the jurisdictional amount question is unresolved. Id. at 565.

The district court in the first *de Aguilar* case further noted that, even if

it had considered the affidavits relevant, the complaint named one hundred unknown petitioners who were not bound by the affidavits, and petitioners' counsel could not bind minor beneficiaries (constituting approximately twenty of the named plaintiffs) to judgments in wrongful death suits without leave of court. *de Aguilar*, 790 F. Supp. at 695. The claims later were dismissed on forum non conveniens grounds. *de Aguilar v. Boeing Co.*, 806 F. Supp. 139 (E.D. Tex. 1992). The court held that direct estoppel barred the plaintiffs from re-litigating the forum non conveniens dismissal. Courts in Illinois, Washington and the Western District of Texas had already ruled on the question of forum non conveniens. Id. at 142. The court also found that, under

traditional forum non conveniens criteria, Mexico would be a more convenient forum. Id. at 142-143.

The Fifth Circuit affirmed the denial of the motion to remand and the dismissal on estoppel and forum non conveniens ground. *de Aguilar v. Boeing Co.*, 11 F.3d 55 (5th Cir. 1993) ("de Aguilar I"). The Fifth Circuit held that the district court had properly disregarded the affidavits because it was "facially apparent" that the damages sought by each plaintiff really exceeded $50,000. Id. at 57. Alternatively, the court noted that the attorney affidavits were not unrebutted by evidence from the defendants. Id. at 57-58. The Fifth Circuit concluded that these points distinguished *de Aguilar I* from ANPAC.

ANPAC, the Fifth Circuit contends in

de Aguilar I, involved claims that were not facially likely to exceed the jurisdictional amount. *ANPAC*, 988 F.2d at 565. In addition, the Fifth Circuit agreed in *de Aguilar I* that, in *ANPAC*, the only "evidence" the defendants produced to rebut the plaintiffs' attorneys' affidavits was the original notice of removal, which merely stated that the matter in controversy exceeded $50,000. Id. The *de Aguilar I* court noted that the defendants in that case had produced testimonial evidence and published precedent suggesting that the matter in controversy exceeded $50,000. *de Aguilar I*, 11 F. 3d at 58.

Shortly after the district court dismissed the de Aguilar claims, petitioners' attorneys filed another petition in state court in Beaumont,

Texas ("de Aguilar II"). See App. D., A78 to A107. In that petition, the pleading at issue now, the petitioners sought only survival damages, dropped forty-two of the heirs, including all of the minors, and dropped any mention of unnamed "Doe" plaintiffs. More importantly, each petitioner sought no more than $50,000.00 and expressly stated in the original state court petition that the amount of his or her claim did not exceed $50,000. Petitioner attached to the original petition an affidavit of attorney Dennis Reich, stating that plaintiffs stipulated and agreed to an irrevocable cap of $50,000 on the amount of damages that could be awarded.[2]

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[2] The state court petition stated in part: "As a direct and proximate result of the negligent acts,...and

conditions created by Defendants... decedents suffered the following damages:

1) The above-named decedents, during the flight of the subject aircraft leading up to the crash, suffered mental anguish due to fear of death, mental anguish and pain and suffering, the value of which will not exceed $50,000 per decedent.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that Defendants be cited to appear and answer, and on final trial, Plaintiffs have:

1) Judgment against Defendants for a sum not to exceed $50,000 per decedent exclusive of interest and court costs;....

Plaintiffs further attach an affidavit of Dennis Reich clearly stating that each decedent's damages are within the jurisdictional amounts of the County Court at Law of Jefferson County, Texas and that each decedent's damages do not exceed $50,000 exclusive of interest and court costs. Dennis Reich's affidavit is attached hereto as Exhibit A and incorporated herein as if set forth herein." See App. D, A102, A103.

Dennis Reich's stipulation attached to the original petition stated in part: "I am the attorney for each Plaintiff identified in the preceding Petition. I

Defendants once again removed the *de Aguilar* case to federal court in the Eastern District of Texas, contending in their notice of removal that the amount in controversy actually exceeded $50,000.

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hereby judicially admit that each claim on behalf of each decedent I represent as a result of the crash of the Boeing 727-S64, Mexicana Airlines, Flight 944, is less than fifty thousand dollars ($50,000.00) exclusive of interest and court cost. Each decedent hereby irrevocably agrees that the amount of damages claimed on their behalf in this action will forever be less than fifty thousand dollars ($50,000.00) exclusive of interest and court costs. Plaintiffs hereby irrevocably agree to the entry of an order of court which places an irrevocable cap upon the amount of damages which may be sought by or awarded to Plaintiffs in this case. This cap should be set at fifty thousand dollars ($50,000.00) exclusive of interest and court costs.

Plaintiff agree, acknowledge, and understand that this stipulation is binding upon them and cannot be rescinded or revoked under any circumstances regardless of any developments which may occur during the investigation, discovery, pretrial or trial of this action." See App. D, A105 to A106.

See App. E, A102 to A120.[3] After removal, plaintiffs filed a supplemental motion to remand for lack of jurisdiction and attached an affidavit from a Mexican lawyer, Guadalupe Bistrain, who was one of the plaintiffs' attorneys. Ms. Bistrain swore that she had received explicit authority from each of the named plaintiffs to limit damages to $50,000 per estate. App. F., A121 to A122.

The district court determined that the plaintiffs had not shown the

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[3] The removal papers essentially contended that, under Texas state law, neither plaintiffs nor their attorneys could bind the decedents estates. See App. E., A111-A117. The affidavit of Howard Close, claiming that one of the counsel for plaintiffs, Mitchell Toups, admitted that he did not know if the representatives of the estates had authority to bind the plaintiffs was completely rebutted by the affidavit of Mr. Toups and Ms. Bistrain. See App. F, A121 to A122; A123 to A124. In any event, the Fifth Circuit did not base its decision on the affidavit of Close.

necessary authority to limit damages and ruled that the amount in controversy exceeded $50,000.[4] App. A., A 1 - A 27. The district court denied the petitioners' motion to remand, primarily on the ground that the stipulation of the petitioners' attorneys and the limiting allegations in the state court petition were not enough to deprive the federal court of jurisdiction. The district court held in effect that the burden was

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[4] Defendants alleged an additional basis for federal jurisdiction. In December 1992, Boeing filed a third party complaint against Mexicana Airlines, which, on January 15, 1993, filed a memorandum that claimed status as a "foreign state" under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611. Petitioners filed a motion to strike or, in the alternative, sever Boeing's third party claim. The district court denied this motion when it denied the motion to remand. Since the Fifth Circuit did not reach this issue, it does not play any role in this Petition for Writ of Certiorari.

not upon the removing party but upon the removed party and that the petitioners had not satisfied that burden. Id.

The district court also denied the forum non conveniens motion, adopting the decision of the district court on that issue in *de Aguilar I* 806 F. Supp at 139; See App. C, A28-A29.[5]

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[5] The petitioners do not question that forum nor conveniens decision under federal forum no conveniens law in this petition for writ certiorari. By conceding this, however, we no not waive any right to contend in state court - if the Court orders this case remanded to state court, as we urgently contend that it should - that, under Texas forum non conveniens law, the case should not be dismissed on forum non conveniens grounds. This is one issue that has never been actually litigated. See Chick Kam Choo v. Exxon, 108 S. Ct. 1684, 1690 (1988). Under Texas law prevailing at the time of the filing of de Aguilar II, the Texas court had no discretion to dismiss on forum non conveniens ground. See Sect. 71.031 of the Texas Civil Practices and Remedies Code and Dow Chemical Co. v. Alforo 786 S.W. 2d 674 (Tex. 1990), cert. den. 498 U.S. 1024 (1991). Texas has recently

The Fifth Circuit affirmed in all respects. See *de Aguilar v. Boeing*, 47 F. 3d 1404 (5th Cir. 1994) and App. C, A30 to A77. After conceding that the petitioners had alleged a specific amount of damages less than the jurisdictional minimum of $50,000 for each decedent, the Fifth Circuit proceeded to grossly misinterpret this Court's decision in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 58 S. Ct. 586 (1938)("Red Cab"). In a remarkable process of rationalizations, the Fifth Circuit effectively shifted the burden to the removed party by imposing voluminous requirements the removed party must

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passed a law that reduces the impact of Alfaro but that law does not affect de Aguilar II since it was filed prior to September 1, 1993, see Sect. 71.051 of the Texas Civil Practices and Remedies Code.

satisfy that were not imposed by *Red Cab*;[6] held that even though plaintiffs voluntarily and expressly limited their recoveries in their state court pleading to an amount less than the federal jurisdictional minimum, such pleading is still subject to the bad faith test upon removal to federal court; and, in a

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[6] These are discussed in detail infra. The removed party must show:

1) that state law permits pleading a limitation;

2) that a stipulation of limitation is effective under state law;

3) that removed party's attorneys have complete authority to make such pleading;

4) that, in death cases, the removed parties are the judicially appointed legal representatives of the estates involved; and

5) that, even though the law of the removed party's domicile allows heirs to represent the estates, if the law of the venue state does not allow the heirs to represent the estate, then, even though the courts throughout the litigation have applied the law of the estates' domicile, the court will apply the law that enlarges federal jurisdiction - in this case Texas state law.

rather shocking display of an appetite for federal jurisdiction, the Fifth Circuit applied Texas law, not federal procedural law or Mexican law, on the question of whether the heirs could bind the estates to a limitation upon the claims, even though previous federal courts considering this litigation, at the request of the removing party had consistently held that Mexican law, not Texas or any American law, applies in this case. See e.g. *Wolf*, 810 P. 2d. at 948, 949; *de Aguilar I*, 806 F. Supp at 142.[7]

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[7] The federal district court in de Aguilar I, at the request of Boeing, held that the law of Mexico applied, stating that "Mexico...has the paramount interest in this lawsuit". 806 F. Supp. at 142. The Fifth Circuit preached the gospel of "law of the case" with respect to the forum non conveniens determination, see footnote 5, App. C A41, but refused to apply it to the finding of the applicability of Mexican law, which is really a subsidiary element in the forum non conveniens

In sum, the Fifth Circuit completely ignored this mandate of the Court in *Red Cab*;

> "If he (Plaintiff) does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove."

303 U.S. at 294, 58 S.Ct. at 593.

REASONS FOR GRANTING WRIT

A. The Red Cab Decision of This Court.

Any analysis of the question of whether a diversity claim satisfies the minimum federal jurisdictional amount prescribed by Congress (now $50,000), must begin with *Red Cab*.

In *Red Cab*, plaintiff filed a diversity suit against defendant alleging breach of an insurance contract. The state court complaint alleged $4,000 in

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analysis.

damages. Defendant removed the case to federal court. Thereafter, plaintiff amended its complaint and, while still stating the damages to be $4,000, attached an exhibit which itemized the damages and showed them actually to total only $1,380.90. Judgment was entered by the federal district court for the plaintiff in the amount of $1,162.98. Upon appeal, the court of appeals sua sponte ordered the case remanded to state court on the ground that the federal courts had no subject matter jurisdiction because the amount in controversy was less than $3,000.00 (the minimum jurisdictional amount at the time).

This Court granted writ of certiorari. The Court first addressed the non-removal situation, where a case is filed originally in the federal court

and the issue is whether the plaintiff is trying to boot-strap himself (by himself or in collusion with the defendant) into federal court when the amount in controversy is really less than the minimum jurisdictional amount. The Court stated:

> "The intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts. The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. Nor does the fact that the complaint discloses the existence of a valid defense to the claim. But if, from the face of the pleadings, it is apparent to a legal certainty that the plaintiff cannot recover the

> amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover the amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed. Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction."

58 S.Ct. at pp. 590, 591.

Having said the foregoing, the Court then addressed the removal situation, explaining the significant differences between how the amount in controversy question is treated when the case is originally filed in federal court and when the case is filed in state court and thence removed to federal court:

> "In a cause instituted in the federal court the plaintiff chooses his forum. He knows or should know whether his claim is within the statutory requirement as to amount. This good faith in choosing the federal forum is open to challenge not only by resort to the face of his complaint, but by the facts

disclosed at trial, and if from either source it is clear that his claim never could have amounted to the sum necessary to give jurisdiction there is no injustice in dismissing the suit. Indeed, this is the court's duty under the Act of 1975. In such original actions it may also well be that plaintiff and defendant have colluded to confer jurisdiction by the method of the one claiming a fictitious amount and the other failing to deny the veracity of the averment of that amount in controversy. Upon disclosure of that state of facts the court should dismiss.

A different situation is presented in the case of a suit instituted in a state court and thence removed. There is a strong presumption that the plaintiff has not claimed a large amount in order to confer jurisdiction on a federal court or that the parties have colluded to that end. For if such were the purpose suit would not have been instituted in the first instance in the state but in the federal court. It is highly unlikely that the parties would pursue this roundabout and troublesome method to get into the federal court by removal when by the same device the suit could be instituted in that court. Moreover, the status of the case as disclosed by the plaintiff's complaint is controlling in the case of a

> removal, since the defendant must file his petition before the time for answer or forever lose his right to remove. Of course, if, on the face of the complaint, it is obvious that the suit cannot involve the necessary amount, removal will be futile and remand will follow."

58 S.Ct. at p. 591, 592; emphasis ours.

The Court then disclosed how it reached its conclusion that the court of appeals erred in ordering remand:

> "And though, as here, the plaintiff after removal, by stipulation, by affidavit, or by amendment of his pleadings, reduces the claim below the requisite amount, this does not deprive the district court of jurisdiction.
>
> Thus events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiffs control or the result of his volition, do not oust the district court's jurisdiction once it has attached."

Then the Court announced the rule that absolutely applies to, and controls, this case:

> "The claim, whether well or ill

> founded in fact, fixes the right of the defendant to remove, and the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election. If he does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove."

58 S.Ct. at p. 593; emphasis ours.

The foregoing statement is simple and plain enough. To us, it says that if the plaintiff chooses to sue in state court for an amount that is less than the minimum for federal court jurisdiction, "the defendant cannot remove" even though the plaintiff could have justly sued for more. All of the discussion by the Court in *Red Cab* about "good faith" or "bad faith" or "legal certainty", clearly pertained only to the non-removal situation, not the removal-remand

situation.[8]

Yet, it is amazing how the federal courts have extrapolated that reasoning over into the removal-remand situation. It is ever more amazing how so much

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[8] The underlying rationale for the difference in treatment is perhaps best expressed in *Shamrock Oil & Gas Corporation v. Sheets* 61 S.Ct. 868, 872 (1941):

> "Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'"

confusion and conflict among the federal courts have arisen out of what is so clear and concise a statement of the law. But arise it has! The confusion and conflict in this area of the law is perhaps more severe than in almost any other.

A good discussion, and example, of how the federal courts have drifted, diverted and gone astray can be found in *Garza v. Bettcher Industries*, 752 F. Supp. 753 (E.D. Mich, 1990). The *Garza* court discusses how some courts have even gone so far as to hold that, if the defendant alleges "a factual basis for federal jurisdiction", the "burden would then shift to plaintiff to prove to a legal certainty that the federal jurisdictional amount is not satisfied." 752 F. Supp. at 757, 758; *Kennard v.*

Harris Corp. Inc., 736 F. Supp. 453, 454 (E.D. Mich, 1989); and *Partlow v. Jones Motors. Inc.*, 736 F. Supp. 744, 746 (E.D. Mich 1990). While the *Garza* court rejected the reasoning in *Kennard* and *Partlow,* it nevertheless also misconstrued *Red Cab* and finally concluded that the appropriate test is that the "Defendant (need only) allege facts sufficient to establish that the Plaintiff would more likely than not recover more than the jurisdictional amount." 752 F. Supp. at 763.

We have mentioned *Garza* because it has, to a great extent, presaged the Fifth Circuit decision in this case.

B. Fifth Circuit Law and Its Holdings In this Case and Their Conflict with *Red Cab*.

There are four cases, including the decision in this case, that illustrate

how the Fifth Circuit has veered off to the extreme edge of the range of decisions dealing with the amount in controversy issue. The Fifth Circuit has enunciated rules that are directly contrary to this Court's *Red Cab* decision and are in direct conflict with decisions in other circuits and federal district courts.

The first of those four cases is *Kliebert v. Upjohn Co.*, 915 F. 2d 142, 147 (5th Cir. 1990), vacated for reh'g en banc, 923 F. 2d 47 (5th Cir.), appeal dism'd per stipulation of settlement, 947 F.2d 736 (5th Cir. 1991) ("Kliebert"). In *Kliebert*, plaintiffs alleged a specific dollar amount of damages that was less than the federal minimum jurisdictional amount. The defendants removed and the Panel of the Fifth

Circuit held that the case should have been remanded. However, the Panel still imposed a restriction upon the removed party that was not permitted, we respectfully submit, by *Red Cab*.

First, the Panel erroneously cited the "legal certainty" and "good faith" doctrines in relying upon *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 353, 81 S.Ct. 1570, 1573 (1961) which was a non-removal case (originally filed in the federal court), rather than a removal case like *Red Cab* and this case. See discussion, 915 F. 2d at 145. Then it discussed the various alternative burdens which different courts have utilized. 915 F. 2d at 146.[9] Eventually,

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[9] What it and so many courts have done is to cite *Red Cab* for the proposition that, in a removal-remand situation, in order to remove "a state court suit originally seeking damages

the Court in *Kliebert* adopted a fairly reasonable approach. It was an approach that was still erroneous and which still disobeyed *Red Cab*. But it was better than most other approaches taken by the lower federal courts. The *Kliebert* court

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below the federal jurisdiction amount, the defendant has the burden of establishing that the plaintiff acted in bad faith in understating his claim." 915 F.2d at 146. To the contrary, *Red Cab* does not, we submit, permit the federal court to examine the motives of the plaintiff in filing suit in state court; if the claim is for less than the jurisdictional amount, then ipso facto the defendant cannot remove, even if the claim could have been brought for a lot more. The court in *Kliebert* then discussed a number of cases that hold that the defendant "has the burden of proving that it does not appear to a legal certainty that the claim is actually for less than the requisite jurisdictional amount," 915 F. 2d at 146, and other cases that reject the foregoing "double negative" approach and hold that "to establish the jurisdictional amount it is sufficient (for the removing defendant to show) that there is a probability that the value of the matter in controversy exceeds the jurisdictional amount." *Id.*

held that the plaintiff's state court pleadings of an amount below the federal jurisdictional level could be attacked on the basis of "bad faith", but held that, in order to do so, "the trial court must be able to conclude from the pleadings or, at the most, summary judgment-type evidence, that if the jury awarded less than $10,000.00, the court would be required to grant a new trial." Id. at 146.

The Fifth Circuit, in *de Aguilar I*, was dealing with a situation where the plaintiffs had not alleged a specific amount below the jurisdictional limit. The Fifth Circuit limited the effect of *ANPAC*, supra, and held that "(w)hen the Plaintiff's complaint does not allege a specific amount of damages, the removing defendant must prove by (nothing more

than) a preponderance of the evidence that the amount in controversy exceeds $50,000.00." 11 F.3d at 58.

Then came this case, *de Aguilar II*. Again, the Fifth Circuit completely disregarded this Court's clear language in *Red Cab*. It set about discussing the various theories, suggested tests and approaches and erroneously drew upon the Court's language - "legal certainty" and "good faith" - which were, as we noted above, intended as guidelines only in the situation where the plaintiff initially files suit in the federal, rather than the state, court and a question arises as to whether the suit is really for an amount in excess of the minimum jurisdiction of the federal courts. See App. C, A44 to A63, particularly A59 to A63; 47 F. 3d at 1409 to 1412.

In further discussing its position, the Fifth Circuit took another step away from traditional concepts of federalism, states rights, comity and removal/remand laws; effectively repudiated *Kliebert*, noting that, since the Panel decision in *Kliebert* was vacated because of a settlement, "Kliebert is no longer precedent in this Court. . .."; and then expressly rejected the principles announced in *Kliebert*:

> "The onerous nature of this burden (adopted in *Kliebert*) stands in direct contrast to the analysis of several district courts that have stated the removal inquiry as a type of '<u>converse legal certainty test</u>.' Under this formulation, defendant 'has the burden of proving that it does not appear to a legal certainty that the claim is actually for less than the requisite amount.' *Hale*, 610 F. Supp. at 164. Courts elsewhere have restated the test and required that the defendant show 'that there is a probability that the value of the matter in controversy' exceeds the jurisdictional amount.....

> As the dissenting judge indicated in *Kliebert*, the strict test adopted by the *Kliebert* majority "seems to conflict with our past decisions that have stated that the standard for determining jurisdictional amount should favor 'those parties seeking to invoke the jurisdiction of the federal district court.' *Kliebert*, 915 F. 2d at 148 (Jolly, J., dissenting) (quoting *Opelika Nursing Home v. Richardson*, 448 F. 2d 658, 663 (5th Cir. 1971).
>
> The *Kliebert* standard also fails adequately to protect defendants from plaintiffs who seek to manipulate their state pleadings to avoid federal court while retaining the possibility of recovering greater damages in state court following remand. This court has spoken adamantly of preventing the plaintiff from being able to destroy the jurisdictional choice that Congress intended to afford a defendant in the removal statute." *Boelens*, 759 F. 2d at 507.

See App. C, A57 to A59; 47 F. 3d at 1411.

The Fifth Circuit then proceeded to impose all sorts of limitations upon the simple, easy-to-apply and clearly understandable language employed in *Red Cab*. First, even where plaintiffs have

expressly limited their damages to less than the minimum jurisdictional amount, the Fifth Circuit held that defendants can sustain removal under the following approach:

> "Consequently, the plaintiff's claim remains presumptively correct unless the defendant can show by a preponderance of the evidence that the amount in controversy is greater than the jurisdictional amount....
>
> So, once a defendant is able to show that the amount in controversy exceeds the jurisdictional amount, removal is proper, provided plaintiff has not shown that it is legally certain that his recovery will not exceed the amount stated in the state complaint. Thus, once the defendant has pointed to an adequate jurisdictional amount, the situation becomes analogous to the 'typical' circumstances in which the *St. Paul Mercury* 'legal certainty' test is applicable: The defendant has established, by a preponderance, that the federal jurisdiction is warranted. At this point, '[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.' *St. Paul Mercury*, 303 U.S. at 289,

App. C, A59 to A60; 47 F.3d at 1412.

Again, it is clear that the Fifth Circuit has, in an unnecessarily confusing fashion, extrapolated the language applicable to non-removal situations and applied it to removal situations even where the plaintiffs have expressly limited their state court suit to less than the jurisdictional amount.

Second, the Fifth Circuit held that, even where plaintiffs expressly limit their claims to less than the jurisdictional amount, they should expressly point out a state law, if one exists, "that prohibits recovery of damages that exceed those requested in the *ad damnum* clause and that prohibits the initial *ad damnum* to be increased by amendment" and, if such a law does not exist, plaintiffs "who want to prevent

removal must file a binding stipulation or affidavit with their complaints. . ." App. C, A63 to A65; 47 F.3d at 1412, citing *In Re Shell Co.*, 970 F.2d 355, 356 (7th Cir. 1992) (per curiam).

Third, the Fifth Circuit in this case held that, because the petitioners had sought damages in prior proceedings far in excess of the minimum jurisdiction of the federal court, it was "facially apparent that the amount in controversy exceeds $50,000.00." App. C., p. A64, A65; 47 Fed. 3d at 1413. This conclusion was erroneous and did not, of course, take into consideration the fact that respondents in this case had offered nothing in settlement and had done nothing but have each of the prior cases dismissed on federal forum non conveniens grounds, thus rendering the cases worth

only what they are worth in Mexico, which is about $10,000.00 per claim, an amount far below the minimum jurisdictional requirement of the federal courts. In other words, the Fifth Circuit's interpretation of what is "facially apparent" is a one-way street interpretation and does not take into consideration the practical realities of a case's value.

Fourth, even though the petitioners in this case had attached to their initial state court pleading the affidavit suggested in *In Re Shell* and by the Fifth Circuit in de Aguilar II (see discussion above), the irrepressible Fifth Circuit then held that the question of whether the lawyers and/or heirs had the right to bind the petitioners to such an affidavit and stipulation (to the

effect that petitioners would not ever seek to recover more than $50,000.00), would be determined under Texas law (which the court then proceeded to misconstrue).[10]

With respect to the question of whether the right to remand can be encumbered by an attack on the lawyer's authority, the Fifth Circuit continues to misconstrue *Red Cab*. In *Red Cab*, this Court expressly held that the plaintiffs

---

[10] See *Johnson v. Holly Farms of Texas, Inc.*, 731 S.W. 2D 641, 647 (Tex. App.--Amarillo, 1987), holding that lawyers and heirs are not required to prove their authority with respect to the right to represent an estate unless "challenged by a plea in abatement or verified denial." In this case, even if Texas law applies, which it does not, since the respondents never filed the necessary papers to place representation in issue (a plea in abatement or verified denial), as required by Texas law, the Fifth Circuit was wrong in holding that this was the way for the court to assert removal jurisdiction.

could avoid federal jurisdiction by the simple "expedient" of suing in the state court for an amount less than the minimum jurisdictional requirement of the federal courts. This Court did not say that such allegations in the state court complaint could be collaterally attacked and that the plaintiffs would still have to overcome all of the hurdles of a virtual trial on the merits in order to finally get the right to remand.

Furthermore, in holding that Texas law applied to the question of whether the pleadings and stipulations could bind the estates, the Fifth Circuit disregarded its own precedent with regard to jurisdictions, such as Texas, that utilize, for conflicts-of-law purposes, the "most significant relationship

test".[11]

See *In Re Air Crash Disaster Near New Orleans, LA,* 821 F.2d 1147 (5th Cir. 1987). In that case, the en banc court of appeals held that, under the most significant relationship test, Uruguay had a more significant relationship to the question of damages concerning the death of a Uruguay citizen, than did Louisiana, even though the crash occurred in Louisiana. See 821 F. 2d at 1170. The Court stated:

> "The laws of the two involved forums are certainly in conflict - Uruguay allows recovery, Louisiana does not- but this observation does not by itself answer whether a true conflict exists. We must also look to the interests of the two states

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[11] At least the Fifth Circuit conceded that the question of which law applies to the authority of heirs to represent the estates "is not a procedural issue; otherwise, the federal procedural rules would apply." See A77, ftn. 12, App. C.; 47 F.2d at 1414.

> involved. Uruguay's interest in seeing that its law applies is apparent - to ensure that an Uruguayan heir or relative of a Uruguayan citizen wrongfully killed may gain compensation for that wrongful death.
>
> . . .
>
> While section 175 (of the "most significant relationship" test) would give Louisiana the initial nod because it is the situs of the injury, Uruguay's interest in seeing that relatives of a deceased Uruguayan citizen recover damages for those wrongful deaths overrides the speculative interest of Louisiana of protecting non-resident tortfeasors."

Indeed, the issue of which law applies is even easier in this case since both the accident occurred in Mexico and the decedents were domiciled in Mexico.

Finally, since the previous courts in this case have held that Mexican law applies, and this ruling was obtained at respondents' request, the respondents are both judicially and collaterally estopped (as to the fact that a prior

determination of applicable law will have res judicata effect, see *Chick Kam Choo v. Exxon* 108. S.Ct. at 1691).

In sum, it is clear that the Fifth Circuit has placed itself as far beyond the holding and intent of *Red Cab* as almost any of the other circuit courts.

C. In Any Event, The Decision In This Case Is In Conflict With Laughlin of The Tenth Circuit, Gaus Of The 9th Circuit, Burns Of The 11th Circuit And Many Other Decisions Of The Circuit And District Courts

In *Laughlin v. K-Mart Corp.*, 50 F. 3d 871 (10th Cir. 1995), an employee brought action in state court against his former employer alleging breach of his employment contract and wrongful termination. The employer removed and the federal district court denied remand. In reversing and ordering remand, the Tenth Circuit held that subject matter jurisdiction did not exist because, while

the petition alleged damages "in excess of $10,000.00", the removal papers simply did not satisfy the heavy burden upon the removing party to show that the "amount in controversy" actually was in excess of the minimum jurisdictional amount (in *Laughlin*, as in this case, the amount of the minimum was $50,000.00, exclusive of costs and interest). The case at bar is even stronger for remand because the petitioners expressly limited the amount of recovery to less than the jurisdictional minimum and, by affidavit, made such commitment irrevocable and in the form of a judicial admission. Yet, in direct conflict with the Tenth Circuit, the Fifth Circuit sustained removal and the Tenth Circuit ordered remand.

The important thing with respect to

Laughlin is that we have been informed that K-Mart, the losing party in Laughlin, will be filing a petition for writ of certiorari by early July and such petition will involve pretty much the same issues as are involved in this case. Such filing will thus present the kind of recent conflict on an important issue as was presented in Chick Kam Choo v. Exxon, 108 S.Ct. 1684 (1988), when writ was granted in that case.

In *Gaus v. Miles, Inc.* 980 Fed 2d 564 (9th Cir. 1992), the plaintiff brought a contract related suit in state court seeking damages in excess of $10,000.00. The defendant removed and the federal district court refused to remand. Referring to the very strong presumption against removal, and noting that federal jurisdiction must be

rejected when there is any doubt about the right of removal, the Ninth Circuit held that the defendant did not provide sufficient proof to justify overcoming the strong presumption against removal where it was unclear has to the amount of damages the plaintiff was actually seeking. Important to this case is the fact that the court in *Gaus* indicated that, if the plaintiff had sought more than the jurisdictional minimum, the defendant would have satisfied its burden but that, if the plaintiff had expressly sought less than the jurisdictional minimum, the plaintiff would have been entitled to remand. Again, as in *Laughlin*, the present case is much stronger with regard to remand and, therefore, the holding by the Fifth Circuit in this case is in conflict with

Gaus, just as it is with *Laughlin*.

In *Burns v. Windsor Insurance Company*, 31 Fed. 3rd 1092 (11th Cir. 1994), the insured brought an action in state court seeking $45,000 in damages from the insurer. The insurer removed and the federal district court denied remand. In its removal papers the insurer asserted that the insured intended to wait one year after remand and then boost her damage claim. There was an indication that the insurer offered to settle for $45,000 (in this case the respondents' true view of this case, as evidenced by their actions, is even worse - they have never offered anything above zero; yet they hypocritically proclaim to the courts that the petitioners' claims are worth millions.)

The court of appeals in *Burns* reversed the district court's denial of remand and ordered the case remanded to state court. The court also countered the somewhat cynical view taken by the Fifth Circuit that affidavits, stipulations and judicial admissions are not sufficient to justify remand. The court in *Burns* stated:

> "Plaintiff's complaint specifically requests $45,000 in damages. Therefore, no jurisdiction exists on the face of plaintiff's claim. So, the critical question is to what extent must defendant prove jurisdiction exists despite plaintiff's express claim to less than the minimum jurisdictional sum?
>
> We believe the defendant's burden of proof must be a heavy one. *C. Boyer*, 913 F.2d at 110-112. Every lawyer is an officer of the court. And, in addition to his duty of diligently researching his client's case, he always has a duty of candor to the tribunal. <u>So, plaintiff's claim, when it is specific and in a pleading signed by a lawyer, deserves deference and a presumption of truth</u>. We will not assume-unless

> given reason to do so-that plaintiff's counsel has falsely represented, or simply does not appreciate, the value of his client's case. Instead, we will assume that plaintiff's counsel best knows the value of his client's case and that counsel is engaging in no deception. We will further presume that plaintiff's counsel understands that, because federal removal jurisdiction is in part determined by the amount of damages a plaintiff seeks, the counsel's choices and representations about damages have important legal consequences and, therefore, raise significant ethical implications for a court officer."

31 Fed. 3d at 1095; emphasis ours. As to the appropriate burdens, the *Burns* court approved *Kliebert*, whereas, as noted above, the court of appeals in this case rejected *Kliebert*.

There is no doubt that *Burns* and the Fifth Circuit in this case are in fatal conflict.

There are many other cases which also conflict with the Fifth Circuit in

this case.[12] See *Iowa C.R. Co. v. Bacon*, 35 S.Ct. 357 (1915) (holding that, where a prayer for recovery was but for $1,990.00, such prayer controlled even though the body of the complaint alleged damages in the amount of $10,000.00, and the case was not removable); *Harley v. Fireman's Fund Insurance Company*, 245 F. 471, 476 (W.D.Wash. 1913) (holding that "the initial pleading" determines the "amount in controversy"; that "the plaintiff may voluntarily and

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[12] And, further contributing to the confusion and conflict among all of the circuits, there are a number of cases that tend to support, at least to some extent, the views of the Fifth Circuit in this case. See e.g. Shaw vs. Dow Brands, Inc., 994 F.2d 364 (7th Cir. 1993); Matter Shell Oil, supra; Dunn vs. Pepsi Cola Metropolitan Bottling Company, 850 F. Supp. 853 (N.,D. Cal. 1994); Garza, supra.; Angus v. Shiley, Inc. 989 F.2d 142, (3d Cir 1993); and Gafford v. General Electric Company, 997 F. 2d 150 (6th Cir. 1992)

conclusively determine the amount to which his recovery shall be limited"; that "the...cases hold that the plaintiff may waive the excess of federal jurisdiction and sue for a less sum"); *Oder v. Buckeye State Mutual Insurance*, 817 F. Sup. 1413, (S.D. Ind. 1992) (plaintiffs "certified" that "they do not seek a recovery in any amount in excess of $50,000.00"; the court construed the certification as a "covenant" which "binds the plaintiffs"; the court remanded the case to state court); *Brady v. Indemnity Insurance Company*, 68 F.2d 302 (6th Cir. 1933); *Gafford v. General Electric Company*, 997 F. 2d 150 (6th Cir. 1993); *Lane v. Champion International Corp.*, 844 F. Sup. 724, 733 (S.D. Alabama 1994) (in ordering remand, the court noted that "(i)t follows that the

plaintiffs and their counsel represent to this court that upon remand they will never amend the ad damnum clause to increase any claim for damages above the $50,000 jurisdictional amount"); *Cole v. Great Atlantic Tea Company*, 727 F. Supp. 1305 (E.D. Ky. 1990) (the court remanded because of plaintiff's stipulation that her unliquidated damages would not exceed $40,000); *J.W. Petroleum Inc. v. Lange*, 787 F. Sup 975 (D.Kan 1992); *Foster v. State Farm Auto Insurance Co.*, 843 F. Sup. 81 (E.D.N.C.1993) (involving situation where state law did not permit the stating of the amount of the demand in the original filing; the court nevertheless remanded the case on the bases of *Red Cab*); *LockLear v. State Farm Mutual Auto Insurance Co.*, 742 F. Sup 679 (S.D.G.A. 1979); *Tongkook America Inc. v.*

Shipton Sportswear Company, 14 F. 3d 781 (2nd Cir. 1994) (holding that where damages sought are uncertain, doubt as to whether damages exceed minimum for diversity jurisdiction should be resolved in favor of plaintiff's pleading); and *Hicks v. Universal Housing Inc.*, 792 F. Supp. 482, 484 (S.D.W.Va 1992) (remanded case where a suit filed in state court sought damages in the amount of $49,000, even though defendant alleged in its removal papers that the actual amount in controversy far exceeded $50,000).

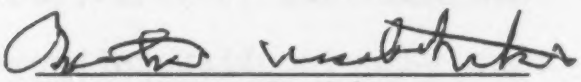
In sum, as we stated in the initial Statement of the Case, the question of the propriety of removal where the amount in controversy is in issue, has generated, unfortunately, the most confusing and conflicting group of decisions from the circuit and district

courts than on any other issue that comes to mind. There is no doubt that these numerous conflicts, some of which are very recent - see *Laughlin* and its conflict with the Fifth Circuit decision in this case - cry out for clarification and reestablishment of uniformity by way of grant of certiorari. Some of the matters that, we respectfully submit, are in dire need of clarification are: whether there are limitations upon the right to remand even though plaintiffs clearly state they are suing for less than the jurisdictional minimum; whether this Court's discussion in Red Cab of "bad faith" and "legal certainty" apply to removal situations as well as to suits originally filed in the federal court; what the burden of proof is with respect to the defendant who removes a case that,

on its face, is for less than the jurisdictional minimum; whether the removing defendants can collaterally attack the clear pleading of plaintiffs and their attorneys that the suit is for less than the jurisdictional amount; if they can collaterally attack such pleadings, as to the question of whether the plaintiffs are bound by their pleadings of a limited amount, which law will apply-federal procedural law, the law of the forum state or the law which has been held to apply to the substantive issues; and, finally, whether the Court literally meant what it said in Red Cab: if a plaintiff pleads expressly that he or she is suing for less than the federal minimum, the case will be remanded even if the true value of the suit is far greater than such minimum.

WHEREFORE PREMISES CONSIDERED, petitioner prays the Court to grant writ of certiorari in this case for the reasons stated above.

Respectfully submitted,



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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1994

ALMA TORREBLANCA DE AGUILAR, ET AL.,
Petitioners,

v.

THE BOEING COMPANY, ET AL.,
Respondent.

Appendices To Petition For Writ of Certiorari

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ALMA TORREBLANCA de AQUILAR, et al.
Plaintiffs,
VS.

THE BOEING COMPANY, et al.
Defendants.

Memorandum Opinion and Orders Denying Motions to Remand and Motion to Strike Third Party Complaint or Alternatively Sever Third Party Action

The Plaintiffs have filed a motion to remand, a supplemental motion to remand, and a motion to strike third party complaint or alternatively sever third party action. After reviewing the motions, the responses, the pleadings of record and attached affidavits, the court is of the opinion that the motions should be **DENIED**.

BACKGROUND

On March 31, 1986 a Mexicana Airlines passenger jet crashed shortly after

takeoff from a Mexico City airport. The crew and all passengers aboard the plane were killed. An investigation conducted by the Mexican government concluded that a tire explosion in the aircraft's wheel well resulted in an in-flight fire that disabled critical aircraft systems and caused the airplane to explode in flight.

Following the crash, relatives of Mexican citizens who perished in the crash filed several different lawsuits in several different state and federal courts in the United States, as well as Mexico. In each lawsuit filed in the United States, the action was either voluntarily dismissed by the plaintiffs, dismissed on the basis of foreign sovereign immunity, or dismissed on the basis of *forum non conveniens*. In fact, a similar lawsuit involving these same defendants and many of the same plaintiffs, was dismissed last

year on the basis of *direct estoppel and forum non conveniens* by the Honorable Howell Cobb, also of the Eastern District of Texas. Torreblanca De Aguilar v. Boeing Co., 806 F. Supp. 139 (E.D. Tex. 1992).

On November 5, 1992 relatives of some of the Mexican citizens who perished in the crash (hereinafter "Plaintiffs") filed this lawsuit in the 60th District Court of Jefferson County, Texas. The original petition in state court alleges negligence and product liability claims on behalf of Plaintiffs as personal representatives of the estates or as the legal heirs of the decedents pursuant to the Texas Survival Statute, TEX. CIV. PRAC. & REM. CODE ANN. §71.021 (Vernon 1992). The petition charges acts of negligence and claims of product liability against The Boeing Company, The B.F. Goodrich Company, The

Goodyear Tire and Rubber Company, Delta Air Lines, Inc., and Parker Hannifin Corporation (hereinafter "Defendants"). The petition, in an apparent attempt to defeat diversity jurisdiction, also alleges that Plaintiffs do not seek to recover more than $50,000 per decedent.

Defendants removed the lawsuit to this Court. Defendants allege that after conducting an investigation of Plaintiffs' purported damages limitation, they have determined that not all indispensable parties are included as plaintiffs. Thus, Defendants allege the purported limitation is ineffective and cannot defeat diversity jurisdiction.

Plaintiffs then filed their motion to remand. Plaintiffs claim that the damages limitation set forth in their petition limits, to a legal certainty, the amount in controversy to less than $50,000.

Plaintiffs also claim that whether they are the legal representatives of the estates of the decedents or the legal heirs entitled to bring these causes of action and limit the amount of damages sought, the case can and should be litigated in state court.

Boeing subsequently filed a third-party complaint against Mexicana Airlines. The third-party complaint alleges that any injuries or damages suffered by Plaintiffs were caused by the acts or omissions of Mexicana. Boeing claims that Mexicana is required to indemnify Boeing from and against any judgment arising out of Plaintiffs' claims against Boeing. Because Mexicana was owned by the government of Mexico, Boeing argues that this third-party complaint, independent of any diversity of citizenship argument, gives the court jurisdiction over this

lawsuit pursuant to the Foreign Sovereign Immunities Act of 1976 (hereinafter "FSIA"), 28 U.S.C. §§1330, 1332, 1391(f), 1441(d), and 1602-1611. Mexicana has answered the third party complaint, denying any liability and opposing Plaintiffs' motion to remand on the same basis of jurisdiction under the FSIA asserted by Boeing. Plaintiffs were then granted leave to file a supplemental motion to remand. In the supplemental motion to remand, Plaintiffs included an affidavit signed by their Mexican attorney wherein she states, without further proof, that each plaintiff is "an heir at law and/or personal representative of the respective decedents" and that she has been given explicit authority to limit their damages to $50,000. Plaintiffs have also moved to strike Boeing's third-party complaint alleging that the only reason

Boeing has filed a claim against Mexicana is to prevent the lawsuit from being remanded. Plaintiffs have moved in the alternative for a severance of the third-party claim.

ANALYSIS

I. **Establishing Federal Jurisdiction**

The burden of establishing that federal jurisdiction exists rests upon the party seeking to invoke it. Gaitor v. Peninsular & Occidental Steamship Company, 287 F.2d 252 (5th Cir. 1961) citing Carson v. Dunham, 121 U.S. 421, 7 S.Ct. 1030, 30 L.Ed. 992 (1887). To invoke the diversity jurisdiction of this court, it must be shown that the matter in controversy exceeds $50,000 and is between citizens of a state and citizens or subjects of a foreign state. 28 U.S.C. §1332(a)(2). There is no dispute that complete diversity exists here. However, there has

been much dispute over the amount in controversy. As the removing parties, Defendants bear the burden of showing that federal jurisdiction exists and must establish that the amount in controversy exceeds $50,000. Id. at 253.

II. Legal Certainty Test

The "legal certainty" test governs questions of jurisdictional amount. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845, 848 (1983). Exactly what a removing party must establish to a "legal certainty" to discharge its burden is unclear in the Fifth Circuit. A test was announced in Kliebert v. Upjohn Co., 915 F.2d 142, 146-47 (5th Cir. 1990), opinion vacated on grant of reh'g en banc, 923 F.2d 47 (5th Cir.), dism'd per settlement, 947 F.2d 736 (5th Cir. 1991). If it had not been vacated, the panel decision in Kliebert

would have required Defendants to establish to a legal certainty that a successful plaintiff would "recover at least the minimum jurisdictional amount." Id. However, a more relaxed standard, one used by Judge Cobb in denying a motion to remand in an earlier lawsuit concerning this same crash, only requires Defendants to prove that there is not a legal certainty that the claim is actually below the jurisdictional amount. See De Aguilar v. Boeing Co., 790 F. Supp. 693, 694 (E.D. Tex. 1992) (hereinafter De Aguilar I"). In other words, the removing defendant must establish that there is some possibility that the plaintiff could recover over $50,000. Apparently, this is the rule in the Fifth Circuit. Foret v. Southern Farm Bureau Life Insurance Co., 918 F.2d 534, 537 (5th Cir. 1990).

III. Amount in Controversy

Defendants argue that there is certainly a possibility that Plaintiffs could recover over $50,000 for a wrongful death cause of action. Defendants content that Plaintiffs' damages limitation is ineffective and therefore the court should look to the recovery of typical wrongful death actions in order to determine the amount in controversy. Defendants point to Judge Cobb's ruling, in the earlier-mentioned denial of a motion to remand in De Aguilar I, in support of their contention that the amount in controversy is indeed to a legal certainty not less than $50,000. Judge Cobb, by looking to damage awards in similar cases, determined that these same plaintiffs were likely to recover more than $50,000 each if they recovered at all. De Aguilar I, 790 F. Supp. at 695.

Plaintiffs argue that they are the

masters of their own pleadings and can determine the amount of damages they seek to recover. They argue that the attorney/client relationship controls whether Plaintiffs are bound by their petition and their attorneys' affidavits which state that Plaintiffs seek to recover less than $50,000. Plaintiffs also argue that Defendants have waived their ability to challenge Plaintiffs' authority to bring suit as personal representatives of the decedents' estate because they have not contested Plaintiffs' authority by a verified denial or plea in abatement as required by the Texas Rules of Civil Procedure. Finally, Plaintiffs contend that under Mexican law they are entitled as lawful heirs of the decedents to pursue these claims directly and have the authority to limit the damages sought by the decedent's estates

to $50,000.

The Court initially observes that generally speaking plaintiffs are the masters of their own pleadings and may determine how much money they seek to recover in a lawsuit. Recognizing this general rule, the Supreme Court has stated that plaintiffs may prevent removal by "resort to the expedient of suing for less than the jurisdictional amount." St. Paul Mercury Indemnity Co., 303 U.S. at 294, 58 S.Ct. at 584, 82 L.Ed. at 851. However, this court recognizes that in order for Plaintiffs to effectively limit their damages they must have the right or authority to bring suit on behalf of the decedents' estates. Thus, the controlling issue is whether Plaintiffs are the legal representatives or the legal heirs entitled to bring suit on behalf of each decedent's estate and to bind the estate

by limiting damages.

A. Defendants Have Not Waived Their Ability To Challenge Plaintiffs' Authority To Bring Suit As Personal Representatives

Plaintiffs apparently contend that they bring this lawsuit as both personal representatives and as legal heirs. In a memorandum in support of the motion to remand Plaintiffs allege, "[I]n this case, the survival actions were brought by the heirs of decedents." (Plaintiffs' Memorandum In Support of Motion to Remand, p. 11). However, in the same paragraph, Plaintiffs also argue that Defendants have waived their ability to challenge Plaintiffs' authority to bring suit as personal representatives of the decedent's estates. Plaintiffs apparently argue that under the Texas Rules of Civil Procedure one who purports to be suing as a personal representative need not prove his

authority unless challenged by a plea in abatement or verified denial. It is Plaintiffs' position that because Defendants have not filed a plea in abatement or verified denial in this case they have waived their ability to attack the validity of Plaintiffs' authority as personal representatives.

Under the Texas Rules of Civil Procedure, a pleading setting up the matter that the plaintiff does not have the legal capacity to sue must be verified. TEX. R. CIV. P. 93(1); See Theobold v. Pate, 542 S.W.2d 460, 464-65 (Tex. Civ. App. -- Tyler, 1976, writ dism'd w.o.j.). In Johnson v. Holly Farms of Texas, Inc., 731 S.W.2d 641, 647 (Tex. App. -- Amarillo 1987, no writ), the Amarillo Court of Appeals ruled that plaintiffs suing under the Texas Survival Statute are not required to prove their

authority to sue as personal representatives unless challenged by a plea in abatement or verified denial. The Federal Rules of Civil Procedure do not require the verification of the denial of a plaintiff's capacity to sue. The Federal Rules have eliminated any need to verify any pleadings, requiring only that the attorney sign his name to submitted pleadings. FED. R. CIV. P. 11. The court must determine, under the Erie doctrine, if the verified denial required under Texas law to contest Plaintiffs' authority to sue is a substantive right requiring compliance by Defendants or if the Federal Rules control the pleading requirements in this case.

This court ruled on a similar Erie doctrine issued in Sneed Shipbuilding, Inc. v. Spanier Marine Corp., 125 F.R.D. 438 (E.D. Tex. 1989). In Sneed

Shipbuilding, the court restated the rule handed down by the Supreme Court in Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed. 2d 8 (1965), "[I]f the rules do conflict, Hanna mandates that the federal rule be applied, even if it changes the outcome, as long as the federal rule is valid in light of due process and the Rules Enabling Act." The court then determined that Federal Rule 11 did not violate due process or the Rules Enabling Act and was to be applied in pleadings situations where the conflicting Texas procedural rules were Texas Rules of Civil Procedure 93(10) and 185. Id. at 444.

The case now before the court is similar. The "right" in question in this case seems to be the right on the plaintiff's part to have the defendant swear to his pleading that disputes the plaintiff's authority to sue as a personal

representative. Without repeating the analysis of Sneed Shipbuilding, the court finds that Defendants are only required to comply with federal pleading requirements and do not need to challenge Plaintiffs' authority to sue as personal representatives by a verified denial or a plea in abatement.

Plaintiffs have offered no proof, other than their Mexican attorney's affidavit, that they are the personal representatives of the respective estates. The court therefore cannot conclude that there is no possibility that the decedents' estates could recover more than $50,000.

B. **Authority of Plaintiffs as Legal Heirs to Limit Damages Sought on Behalf of the Estate**

Plaintiffs contend that under Mexican Law they are entitled as lawful heirs of the decedents to pursue these claims and

have the authority to limit the damages sought by the decedent's estates to $50,000. Defendants allege that under Texas law all potential legal heirs to an estate are indispensable parties to a survival cause of action involving that decedent's estate. Defendants argue that because not all legal heirs are parties to this lawsuit, the damages limitation is ineffective and cannot defeat diversity jurisdiction. To resolve this issue, the court must determine whether Texas or Mexican law should control the extent of a legal heir's authority when bringing a claim on the behalf of a decedent's estate.

"In a diversity action in federal court, a district court is required to follow the choice of law rules of the state in which it sits." Mitchell v. Lone Star Ammunition, Inc., 913 F.2d 242, 249

(5th Cir. 1990) [citing Klaxon v. Stentor Electric Mfg. Co., 313 U.S. 487, 496, 61 S.Ct. 1020, 1021-22, 85 L.Ed. 1477 (1941)]. Under Texas law, "in all choice of law cases, except those contract cases in which the parties have agreed to a valid choice of law clause, the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue." Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421 (Tex. 1984). Thus, it is necessary for the court to determine whether Texas or Mexico has the most significant relationship to the ability and authority of a legal heir to sue on behalf of an estate seeking to recover under the Texas Survival Statute.

In applying the most significant relationship test, the court must identify the relevant state contacts. The

following contacts in the state of Texas are present in this case: all defendants conduct business and are amenable to process, the forum providing the legal basis for the cause of action being brought by Plaintiffs is Texas, and the Texas courts system is being utilized to pursue these claims. The following contacts in Mexico are present in this case: all plaintiffs are from Mexico, all decedents were from Mexico, and the crash occurred in Mexico.

"The application of the most significant relationship approach to the resolution of choice of law questions does not turn on the number of contacts, but more importantly on the qualitative nature of those contacts as affected by the policy factors enumerated in Section 6 [of the Restatement]." Mitchell, 913 F.2d at 249 [citing Gutierrez v. Collins, 583

S.W.2d 312, 318 (Tex. 1979)].[1] Therefore, after identifying the states with relevant contacts, the court must identify the policies or governmental interests of each state in the controversy in question. Id.

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[1]Section 6 of the Restatement (Second) of Conflict of Laws provides,

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

In its analysis, the court confines itself to the issue of whether Texas or Mexican law should govern the authority of a legal heir when that heir is attempting to prosecute a survival claim on behalf of a decedent's estate. Given the fact that this case is brought in the state of Texas of foreign plaintiffs seeking to take advantage of the Texas Wrongful Death Statute, the court finds it hard to conceive of any overriding interest in applying Mexican law. On the other hand, there are several significant reasons for applying Texas law.

Texas certainly has an interest in requiring that those seeking to assert claims in its courts meet certain requirements before asserting those claims. For instance, in situations such as this, the courts would spend an inordinate amount of time trying to

determine a foreign country's laws regarding who has the authority to prosecute suits on behalf of an estate. Such an undertaking would be difficult and time-consuming. Requiring compliance with Texas law certainly promotes the efficiency of Texas courts in these matters. Further, it promotes the uniformity, predictability, and certainty of decisions dictating who has the authority to bring these causes of action and how they must bring them. Based upon these factors, the court believes that Texas courts would choose to apply Texas law.

In order to prosecute a survival cause of action on behalf of an estate as a legal heir, a plaintiff must establish three things under Texas law. The plaintiff must allege (1) that no administration of the estate is pending,

(2) that no administration is necessary, and (3) that the plaintiff is the sole owner of the claim for damages which survived to the decedent's heirs, legal representatives and estate. See Lozano v. Smith, 718 F.2d 756, 773, n. 38 (5th Cir. 1983). Plaintiffs have alleged none of these elements.

The court notes that even if it were proper to apply Mexican law, Plaintiffs have failed to provide any support for their allegation that under Mexican law they would have the authority to pursue these claims and limit the damages sought to be recovered. While the court was unable to uncover much relevant Mexican law, it did research the statutes cited by Plaintiffs in a memorandum to the court. Plaintiffs cited the "Civil Code of Federal District arts. 1281-1294, 1599-1791" for the proposition that these heirs

could make and prosecute these claims directly on behalf of the estate. The only relevant article in the Mexican Civil Code the court could find, in the wide array of statutes cited by Plaintiffs, was Article 1289 which reads, "[e]ach heir may dispose of the right which he has in the estate; but he cannot dispose of the things which constitute the estate." The court was not provided with or able to find any case law interpreting this provision, but the last half of Article 1289 may prevent Plaintiffs from binding an estate to a compromise without including all other persons who have an interest in the estate. Therefore, the court finds that Plaintiffs would be precluded from making a binding damages limitation under Mexican law.

CONCLUSION

The court finds that under Texas law

Plaintiffs have not shown they have the authority to limit the damages sought to be recovered by the estates in this lawsuit. Further, even if Mexican law controlled the question of Plaintiffs' authority to limit damages, these plaintiffs have not shown they have the authority. Therefore, the court finds that the amount in controversy exceeded $50,000 at the time this lawsuit was removed and this court has jurisdiction.

IT IS, therefore, ORDERED that Plaintiffs' motion to remand are **DENIED**.

IT IS further ORDERED that Plaintiffs' motion to strike Boeing's third-party complaint, on the basis of fraudulent joinder to create federal jurisdiction, and in the alternative to sever the third-party complaint, in order to remand the main action, should also be **DENIED**.

SIGNED this the 8th of June 1993.

/s/

Richard A. Schell
United States District Judge

APPENDIX B

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS BASED ON FORUM NON CONVENIENS

CAME ON TO BE CONSIDERED Defendant The Boeing Company's motion for summary judgment and motion to dismiss on the basis of forum non conveniens, which are joined in by all other defendants and the third-party defendant. After reviewing the motions, the lack of response in opposition, and the pleadings of record, the court is of the opinion that the Defendants' motion to dismiss should be **GRANTED** and, therefore, the court does not reach Defendants' motion for summary judgment.

On June 8, 1993 this court denied Plaintiffs' motion to remand this case to Texas state court. On July 8, 1993 Boeing filed a motion for summary judgment based on limitations and in the alternative a

motion to dismiss Plaintiffs' claim based on forum non conveniens. Shortly thereafter, all other defendants, Delta Air Lines, Inc., the Goodyear Tire and Rubber Company, the B.F. Goodrich Company, Parker Hannifin Corporation, as well as the third-party defendant, Compania Mexicana de Aviacion, S.A., d/b/a Mexicana Airlines, joined in Boeing's motions.

IT IS, therefore, ORDERED that Defendants' Motion to Dismiss on the grounds of forum non conveniens is GRANTED, and this action is **DISMISSED** at Plaintiffs' cost.

SIGNED this the 11th day of August, 1993.

/S/
Richard A. Schell
United States District Judge

APPENDIX C

IN THE UNITED STATES OF COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5333

ALMA TORREBLANCA DE AGUILAR, et al.,
Plaintiffs-Appellants,

VERSUS

BOEING COMPANY, et al.,
Defendants-Appellees.

Appeal from the United States
District Court
for the Eastern District of Texas

Before SMITH and EMILIO M. GARZA, Circuit Judge, and STAGG,[2] District Judge.

JERRY E. SMITH, Circuit Judge:

Plaintiffs, the relatives of persons who died in an airline crash in Mexico, appeal the district court's denial of

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1District Judge of the Western District of Louisiana, sitting by designation.

their motion to remand to state court, the failure of the district court to strike or sever the third party complaint by defendant Boeing Company ("Boeing"), and the dismissal on the ground of forum non conveniens ("f.n.c."). Concluding that the district court did not err, we affirm.

I.

On March 31, 1986, a Mexicana Airlines jet crashed near Mexico City, killing everyone on board. An investigation concluded that a tire exploded in the wheel well while the plane was in flight, causing an in-flight fire that eventually caused the plane to explode.

II.

Relatives and personal representatives of the estates of those who died filed several lawsuits throughout the United States and in Mexico. In every

lawsuit filed in the United States, the action has been either voluntarily dismissed by the plaintiffs or dismissed on the basis of foreign sovereign immunity or f.n.c.[3]

Plaintiffs have been determined to find a United States forum in which to try their case. In November 1992, they filed this action in Texas state court, claiming to be the personal representatives of the estates of each decedent and the legal heirs of the decedents pursuant to the Texas Survival Statute, TEX. CIV. PRAC. & REM. CODE ANN. §71.021 (Vernon 1986). The

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[3]See de Aguilar v. Boeing, Co., 11 F.3d 55 (5th Cir., 1993); Compania Mexicana de Aviacion, S.A. v. United States Dist. Court, 859 F.2d 1354 (9th Cir. 1988); Rodriguez v. Mexicana de Avion, S.A., (W.D. Tex. 1987), aff'd mem., 843 F.2d 498 (5th Cir.), cert. denied, 488 U.S. 826 (1988); Wolf v. Boeing Co., 810 P.2d 943 (Wash. App.), review denied, 818 P.2d 1098 (Wash. 1991).

plaintiffs charged negligence and products liability against Boeing, B.F. Goodrich, Goodyear Tire and Rubber, Delta Airlines, and Parker Hannifin Corporation. Under TEX. R. CIV. P. 47, plaintiffs were not allowed to plead for a specific amount of damages.[4]

After defendants removed the case to federal court in the Eastern District of Texas, plaintiffs filed affidavits executed by certain plaintiffs and by the plaintiffs' attorneys, purporting to limit the damages they were seeking, and moved to remand on the ground that the $50,000 jurisdictional amount requirement was not satisfied. See 28 U.S.C. §1332. The district court denied remand, holding that

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[4]The rule states, "An original pleading. . . shall contain . . . (b) in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limits of the court."

the affidavits were irrelevant because "jurisdiction attaches at the time of removal, and subsequent events do not oust the court of jurisdiction." De Aguilar v. Boeing Co., 790 F. Supp. 693, 694 (E.D. Tex. 1992). Subsequently, however, this court decided Asociacion Nacional de Pescadores v. Dow Quimica de Colombia S.A. ("ANPAC"), 988 F.2d 559 (5th Cir. 1993), cert. denied, 114 S. Ct. 685 (1994), concluding that post-removal affidavits sometimes can be relevant where the jurisdictional amount question is unresolved. Id. at 565.

The district court a quo further noted that, even if it had considered the affidavits relevant, the complaint named one hundred unknown plaintiffs who were not bound by the affidavits, and plaintiffs' counsel could not bind minor beneficiaries (constituting approximately

twenty of the named plaintiffs) to judgments in wrongful death suits without leave of court. De Aguilar, 790 F. Supp. 695. The claims later were dismissed on f.n.c. grounds. De Aguilar v. Boeing Co., 806 F. Supp. 139 (E.D. Tex. 1992). The Court held that direct estopped barred the plaintiffs from relitigating the f.n.c. dismissal. Courts in Illinois, Washington, and the Western District of Texas had already ruled on this matter. Id. at 142. Alternatively, the court found that under traditional f.n.c. criteria, the Eastern District of Texas would not be a convenient forum. Id. at 142-43.

This court affirmed the denial of the motion to remand and the dismissal on estopped and f.n.c. grounds. De Aguilar v. Boeing Co. ("De Aguilar I"), 11 F.3d 55 (5th Cir. 1993). We held that the

district court had properly disregarded the affidavits because it was "facility apparent" that the damages sought by each plaintiff exceeded $50,000. Id. at 57. Alternatively, we noted that the attorney affidavits were not unrebutted by evidence from the defendants. Id. at 57-58. These points distinguished De Aguilar I from ANPAC.

ANPAC involved claims that were not facially likely to exceed the jurisdictional amount. ANPAC, 988 F.2d at 565. In addition, in ANPAC, the only "evidence" the defendants produced to rebut the plaintiffs' attorneys' affidavits was the original notice of removal, which merely stated that the matter in controversy exceeded $50,000. Id. The De Aguilar I court noted that the defendants in that case had produced testimonial evidence and published

precedent that indicated that the matter in controversy indeed exceeded $50,000. De Aguilar I, 11 F.3d at 58.

In the alternative, the plaintiffs in De Aguilar I argued that the original notice of removal was invalid because the defendants failed to prove that the amount in controversy exceeded $50,000. We rejected this argument because defendants had shown that plaintiffs had pled damages of up to $5,000,000 in other fora for the same injuries. Id.

In the instant case, shortly after the district court had dismissed the original claims, plaintiffs' attorneys filed another petition in state court. In this petition, at issue now, the plaintiffs dropped forty-two of the heirs, including all of the minors, and any mention of unnamed "Doe" plaintiffs. More importantly, plaintiffs, in apparent

violation of TEX. R. CIV. P. 47, described the amount of their claim by specifically alleging that their damages did not exceed $50,000. Plaintiffs attached to the original petition an affidavit of attorney Dennis Reich stating that plaintiffs had agreed to an irrevocable cap on the amount of damages that could be awarded.

After service, defendants attempted to clarify whether Reich's affidavit constituted a binding limitation on the respective estates' damages. Howard Close, counsel for Boeing, sent Reich a letter asking for an amendment to the affidavit, or a new affidavit, in which Reich would attest that the plaintiffs had been appointed the personal representatives of the estates and had expressly authorized Reich to make a binding and irrevocable admission on their behalf.

One of the plaintiffs' attorneys, Mitchell Toup, had a discussion with Close about the proposed amendments to Reich's affidavit. The parties appear to dispute exactly what took place, though both sides agree that plaintiffs' counsel refused to say that the plaintiffs had been appointed by a qualified court as the personal representatives of the estates. According to defendants, Toups also said that none of the plaintiffs' American attorneys had actually talked to the plaintiffs. Plaintiffs claim that the reason they refused to acknowledge that they had been appointed the personal representatives of the estates was that they were suing as heirs, not representatives.

Defendants concluded that the plaintiffs named in the petition were simply <u>some</u> of the heirs of the decedents and did not have the authority to limit

damages. As a result, defendants once again removed to federal court in the Eastern District of Texas, establishing in their notice of removal that the amount in controversy exceeded $50,000.

Three months after removal, plaintiffs filed a supplemental motion to remand for lack of jurisdiction and attached an affidavit from a Mexican lawyer, Guadalupe Bistrain, who was one of the plaintiffs' attorneys. Bistrain swore that she had received explicit authority from each of the named plaintiffs to limit damages to $50,000. The district court determined that the plaintiffs had not shown the necessary authority to limit damages and ruled that the amount in controversy exceeded $50,000.

Defendants alleged an additional basis for federal jurisdiction. In December 1992, Boeing filed a third party

complaint against Mexicana Airlines, which on January 15, 1993, filed a memorandum that claimed status as a "foreign state" under the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602-1611. Plaintiffs filed a motion to strike or, in the alternative, sever Boeing's third party claim. The district court denied this motion when it denied the motion to remand. Defendants subsequently moved to dismiss on f.n.c. grounds; the court granted this motion.[5]

III.

Since the crash, plaintiffs have made repeated attempts to locate an American forum. There are actions pending in the

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[5]There is no merit to the plaintiffs' appeal of the f.n.c. dismissal. We affirmed, in de Aguilar I, 11 F.3d at 58-59, the dismissal on f.n.c. grounds. Thus, if we decide that there was federal jurisdiction in this case, the f.n.c. dismissal is law of the case.

Mexican courts also. The Supreme Court of Texas had held that the doctrine of f.n.c. no longer applied in Texas wrongful death actions. See Dow Chemical Co. v. Alfaro, 786 S.W. 2d 674 (Tex. 1990), cert denied, 498 U.S. 1024 (1991). The Texas Legislature then overruled Alfaro. See TEX. CIV. PRAC. & REM. CODE ANN. § 71.051; "21" Int'l Holdings v. Westinghouse, 856 S.W. 2d 479 (Tex. App. - San Antonio 1993, no writ). The new statute, however, applied only to causes of action filed on or after September 1, 1993. Thus, plaintiffs obviously prefer Texas state court to federal court, where f.n.c. applies.

IV.

As we have stated, plaintiffs' state court petition averred that they were seeking no recovery in excess of $50,000. During oral argument, plaintiffs

characterized their claim as a plea for a specific amount of damages. They argue that De Aguilar I was premised on the fact that the complaint in that case "did not specify an amount of damages." De Aguilar I, 11 F. 3d at 57.

Indeed, strictly speaking, plaintiffs have not alleged a specific amount of damages, as the amount they claim can range from $1 to $50,000. We will treat the claim, however, as one for a specific amount of damages.[6] Plaintiffs have labored to specify one "magic" number in their complaint, i.e. $50,000. We regard such a complaint as more like a claim for one sum rather than a claim for an unlimited or an unspecified amount of damages; to reason otherwise would put form over substance. As a functional

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[6]This critical distinction renders ANPAC inopposite.

matter, plaintiffs are attempting to avoid federal jurisdiction. This goal is the same whether they pick a number such as $49,999 or merely announce a ceiling that, conveniently, is barely within the statutory limit.

Defendants, as on all previous occasions, seek to retain this case in federal court. In general, defendants may remove a civil action if a federal court would have had original jurisdiction. See 28 U.S.C. § 1441(a). In this particular case, jurisdiction is asserted on the basis of diversity of citizenship. 28 U.S.C. § 1332. The removing party bears the burden of establishing that federal jurisdiction exits. Gaitor v. Peninsular & Occidental S.S. Co., 287 F.2d 252, 253-54 (5th Cir. 1961).

"Unless the law gives a different rule, the sum claimed by the plaintiff

controls if the claim is apparently made in good faith." St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288 (1938). Most discussions of jurisdictional amount in removal cases begin with St. Paul Mercury.

In St. Paul Mercury, the Court announced the now famous "legal certainty" test for diversity cases: In order for a federal court to decline jurisdiction, "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount." Id. at 289. Many courts have applied the "legal certainty" language to jurisdictional amount questions in remand cases;[7] there is, however, disagreement as to exactly what a plaintiff has to show to a legal certainty

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[7] E.g., Hale v. Billups, Inc., 610 F. Supp. 162, 164 (M.D. La. 1985); Locklear v. State Farm Mutual Auto Ins. Co., 742 F. Supp. 679 (S.D. Ga. 1989).

to defeat federal jurisdiction.

In St. Paul Mercury, the plaintiff originally alleged damages above the jurisdictional amount in state court but amended the complaint in federal court to state less than the required amount. The Court held that the subsequent amendment could not strip the federal court of jurisdiction, provided that the original claim for damages was made in good faith. The "legal certainty" test was articulated in the Court's more general discussion of jurisdiction:

> The intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts. The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rules, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a

> legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. Nor does the fact that the complaint discloses the existence of a valid defense to the claim. But if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed, or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed. Events occurring subsequent to the institution of the suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction.

Id. at 288-90 (footnotes omitted).

The above discussion and, hence, the legal certainty test, contemplate the

"typical" diversity situation.[8] As one court has indicated, the legal certainty test "is explicitly premised on the assumption that the amount in controversy is met by the express allegations of the plaintiff's complaint and is limited in utility to cases in which the plaintiff himself has placed the requisite jurisdictional amount in controversy by requesting damages in excess of the jurisdictional amount." Garza v. Bettcher Indus., Inc., 752 F. Supp. 753, 755 (E.D. Mich. 1990).

This court has indicated that the legal certainty test does not apply in a remand situation where the plaintiff has alleged an indeterminate amount of damages. In De Aguilar I, we stated that

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[8]In a typical diversity situation, the plaintiff files a suit in federal court alleging damages in excess of the jurisdictional amount.

"[w]hen the plaintiff's complaint does not allege a specific amount of damages, the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds $50,000." 11 F.3d at 58 (citing Gaus v. Miles, Inc., 980 F.2d 564, 567 (9th Cir. 1992); Garza, 752 F. Supp. at 763). See also Burns v. Windsor Ins. Co., 31 F.3d 1092., 1094 (11th Cir. 1994) (noting that in the "typical" removal case "defendant can remove to federal court if he can show, by a preponderance of the evidence, facts supporting jurisdiction").

The question in this case is different from that in both the typical diversity situation and the typical removal situation. Here, the plaintiffs, in a bold effort to avoid federal court, have specifically alleged that their respective damages will not exceed the

jurisdiction amount.

Plaintiffs have correctly cited the provision in St. Paul Mercury that a plaintiff who does not "desire to try his case in federal court . . . may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove." 303 U.S. at 294. The inquiry, however, does not end merely because the plaintiff alleges damages below the threshold. The face of the plaintiff's pleading will not control if made in bad faith.

Moreover, the above statement from St. Paul Mercury plainly was premised on the notion that the plaintiff would not be able to recover more in state court than what was alleged in the state court complaint. So, for example, in Woods v. Massachusetts Protective Ass'n, 34 F.2d

501 (E.D. Ky. 1929), cited in St. Paul Mercury in support of the above-quoted passage, the plaintiff sued for an amount under the jurisdiction limit. Under the state provision in that case, "if there had been no removal and an answer had been filed, plaintiff would not have been entitled to judgment for more than [the amount for which plaintiff sued]." Id. at 504.[9]

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[9]See also Iowa Cent. Ryu. v. Bacon, 236 U.S. 305, 309 (1915) (state pleading for less than jurisdictional amount approved where "[t]he state court had authority to determine the effect of the prayer to the petition and it decided that, under the petition, no more than the amount prayed for could be recovered in the action"); Harley v. Firemen's Fund Ins. Co., 245 F. 471, 476 (W.D. Wash. 1913) (noting that "the initial pleading, and the only pleading filed in the state court. . . fixes the amount in controversy in this case at [an amount below the jurisdictional amount] and no greater sum can be recovered"); Maine v. Gilman, 11 F. 214, 215 (C.C.D. Me. 1882) ("In the mode of pleading adopted in Maine the ad damnum binds the plaintiff as a maximum, and a judgment for more is erroneous, or, at

The majority of states now, however, have followed the example of FED. R. CIV. P. 54(c) and do not limit damages awards to the amount specified in the ad damnum clause of the state pleading. See Burns, 31 F.3d at 1097 n.11. In fact, many states, like Texas, have enacted rules that strictly prohibit plaintiffs from pleading for specific amounts in cases of unliquidated damages.

These new rules have created the potential for abusive manipulation by plaintiffs, who may plead for damages below the jurisdictional amount in state court with the knowledge that the claim is

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least, if not technically erroneous would be irregular and improper."); 1A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.157[6], at 133-34 (2D ed. 1993) (stating that plaintiff "may prevent removal by the expedient of suing for less than the jurisdictional amount unless his attempted waiver of the balance is legally ineffective").

actually worth more, but also with the knowledge that they may be able to evade federal jurisdiction by virtue of the pleading. Such manipulation is surely characterized as bad faith. See Boelens v. Redman Homes, Inc., 759 F.2d 504, 507 (5th Cir. 1985) (stating that "tactical manipulation [by the] plaintiff cannot . . . be condoned") (quoting Austwick v. Board of Educ., 555 F. Supp. 840, 842 (N.D. Ill. 1983)). Likewise, as one treatise has indicated,

> if the prayer for relief must be ignored under applicable principles of law and plaintiff can, therefore, recover more on his state claim than the jurisdictional minimum, the case is removable; and, where plaintiff's cause of action and the relief actually sought clearly involve a controversy in excess of the required amount, removal is not defeated by a monetary prayer for less than the amount.

1A MOORE, supra, ¶0.158, at 204-05

(footnotes omitted).[10]

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[10]The Seventh Circuit has stated:

> St. Paul held that a plaintiff may not obtain a remand by amending the complaint to seek less than the jurisdictional amount. This principle has led some courts to hold that removal is proper, although the Complaint asks for less than the jurisdictional amount, when state law permits a court to award more and the court is likely to do so if it decides in the plaintiff's favor.

In re Shell Oil Co., 966 F. 2d 1130, 1131 (7th Cir. 1992) (citing Cole v. Freightliner Corp., 1991 U.S. Dist. LEXIS 3408 (N.D. Ill.); Garza; Johnson v. Core-Vent Corp., 1990 U.S. Dist. LEXIS 4225 (N.D. Ill.); Locklear v. State Farm Mut. Auto. Ins. Co., 742 F. Supp. 281 (S.D. Ala. 1989); Corwin Jeep Sales & Serv., Inc. v. American Motors Sales Corp., 670 F. Supp. 591 (M.D. Pa. 1986); Steele v. Underwriters Adjusting Co., 649 F. Supp. 1414 (M.D. Ala. 1986); Hale v. Billups, Inc., 610 F. Supp. 162 (M.D. La. 1985). but see Burns v. Windsor Ins. Co., 31 F. 31 F.3d 1092, 1097 (11th Cir. 1994) (stating that permitting removal where the plaintiff is not bound by his state pleading but pleads an amount of damages below the jurisdictional amount "would allow state rules of procedure to determine when federal jurisdiction existed" and "could lead to inconsistent application of federal jurisdictional rules") (footnote omitted).

Accordingly, we hold that if a defendant can show that the amount in controversy actually exceeds the jurisdictional amount, the plaintiff must be able to show that, as a matter of law, it is certain that he will not be able to recover more than the damages for which he has prayed in the state court complaint. Such a rule is necessary to avoid the sort of manipulation that has occurred in the instant case.

The exact extent of the burden on the defendant in this situation was addressed by a panel majority of this court in Kliebert v. Upjohn Co., 915 F. 2d 142, 147 (5th Cir. 1990), vacated for reh'g en banc, 923 F. 2d 47 (5th Cir.), appeal dism'd per stipulation of settlement, 947 F.2d 736 (5th Cir. 1991). Having been vacated, Kliebert is no longer precedent in this court, but its analysis is useful.

In Kliebert, the plaintiffs alleged a specific dollar amount of damages that was less than the federal jurisdiction amount. The panel majority held that to remove, the defendants would have to show that it was legally certain that plaintiffs would recover more than the jurisdictional amount. Id. at 146. Thus, the defendants would have to show that "if a jury awarded less than [the jurisdictional amount] the court would be required to grant a new trial." Id.

The onerous nature of this burden stands in direct contrast to the analysis of several district courts that have stated the removal inquiry as a type of "converse legal certainty test." Under this formulation, defendant "has the burden of proving that it does not appear to a legal certainty that the claim is actually for less than the requisite

amount." Hale, 610 F. Supp. at 164. Courts elsewhere have restated the test and required that the defendant show "'that there is a probability that the value of the matter in controversy' exceeds the jurisdictional amount." Corwin Jeep Sales, 670 F. Supp. at 595 (quoting Cunningham v. Ford Motor Co., 413 F. Supp. 1101, 1103 (D.S.C. 1976).

In the present case, the district court held that the removing defendant had to establish that there is "some possibility" that the plaintiff could recover over $50,000. This formulation is supported by language from Foret v. Southern Farm Bureau Life Ins. Co., 918 F.2d 534, 537 (5th Cir. 1990), in which we held that it was not error for the district court to exercise jurisdiction over a case where "the plaintiffs could have recovered more than $50,000."

Both sides argue that the preponderance of the evidence standard announced in De Aguilar I should apply in this case. We agree. As the dissenting judge indicated in Kliebert, the strict test adopted by the Kliebert majority "seems to conflict with our past decisions that have stated that the standard for determining jurisdictional amount should favor 'those parties seeking to invoke the jurisdiction of a federal district court.'" Kliebert, 915 F.2d at 148 (Jolly, J., dissenting) (quoting Opelika Nursing Home v. Richardson, 448 F. 2d 658, 663 (5th Cir. 1971)).

The Kliebert standard also fails adequately to protect defendants from plaintiffs who seek to manipulate their state pleadings to avoid federal court while retaining the possibility of recovering greater damages in state court

following remand. This court has spoken adamantly of "preventing the plaintiff from being able to destroy the jurisdictional choice that Congress intended to afford a defendant in the removal statute." Boelens, 759 F.2d at 507.

We regard, however, the "some possibility" standard applied by the district court and the "converse legal certainty" test, which essentially require that the defendant merely show that plaintiff could recover more than the jurisdictional amount, as too permissive. See Burns, 31 F. 3d at 1092 ("The possibility that plaintiff may in the future seek or recover more damages is insufficient to support federal jurisdiction now.") (emphasis added). Plaintiff is, to some extent, still the master of his own claim. See, e.g.,

Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 & n.7 (1987); 14A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §3702, at 22 (2d ed. 1985).

Consequently, the plaintiff's claim remains presumptively correct unless the defendant can show by a preponderance of the evidence that the amount in controversy is greater than the jurisdictional amount. The preponderance burden forces the defendant to do more than point to a state law that might allow the plaintiff to recover more than what is pled.[11] The defendant must produce evidence that establishes that the actual amount in controversy exceeds $50,000.

Our court has already said, in the instant case, that it is facially apparent

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[11]Such a holding would render the jurisdictional amount all but meaningless in states with rules analogous to FED. R. CIV. P. 54(c). See 14A WRIGHT, supra,

that the damages rise to a level above $50,000. De Aguilar I, 11 F.3d at 57. As a result, despite the fact that the district court imposed the wrong burden, there is no question that preponderance burden, had the district court applied it, easily would be met by these defendants. In fact, in accordance with the law of the case principle, this court is bound by what we held in De Aguilar I.

So, once a defendant is able to show that the amount in controversy exceeds the jurisdictional amount, removal is proper, provided plaintiff has not shown that it is legally certain that his recovery will not exceed the amount stated in the state complaint. Thus, once the defendant has pointed to an adequate jurisdictional amount, the situation becomes analogous to the "typical" circumstances in which the St. Paul Mercury "legal certainty" test is

applicable. The defendant has established, by a preponderance, that federal jurisdiction is warranted. At this point, "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." St. Paul Mercury, 303 U.S. at 289.

We emphasize that this is not burden-shifting exercise. In light of St. Paul Mercury, plaintiff must make all information known at the time he files the complaint.

Plaintiff's "legal certainty" obligation might be met in various ways; we can only speculate, without intimating how we might rule in such case. Plaintiff's state complaint might cite, for example, to a state law that prohibits recovery of damages that exceed those requested in the ad damnum clause and that

prohibits the initial ad damnum to be increased by amendment. Absent such a statute, "[l]itigants who want to prevent removal must file a binding stipulation or affidavit with their complaints; once a defendant has removed the case, St. Paul makes later filings irrelevant." In re Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992) (per curiam).[12]

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[12]The Eleventh Circuit has expressed reluctance to allow state rules of procedure to determine when federal jurisdiction exists. See Burns, 31 F.3d at 1097. We note, however, the cases that we have cited, especially those mentioned by the St. Paul Mercury Court, which expressly reference state procedural rules in the context of removal.

Moreover, while the Eleventh Circuit fears the "inconsistent application of federal jurisdictional rules," we observe that the same "rule" will now hold throughout the circuit. The general principle is that plaintiffs will have to show that they are bound irrevocably by their state pleadings in these situations. Certainly, plaintiffs who plead for specific damages and who are in states that have procedural rules binding them to their pleadings will satisfy their burden

V.

The state complaint in this case was filed in Texas, which has the following procedural provision: "An original pleading . . . shall contain . . . (b) in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limits of the court." TEX. R. CIV. P. 47(b). Plaintiffs acknowledge during oral argument that their filing violated rule 47(b). Accordingly, there is no state provision that limits the amount of damages plaintiffs are seeking, or can recover, to the amount they have asked for in the complaint, i.e., an amount not to exceed $50,000. In summary, therefore, a

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more easily. Others will have the same opportunity to avoid federal court but will have to choose another method to show their commitment to recovery below the federal threshold.

plaintiff, in a case for unliquidated damages, cannot, absent a further showing, avoid removal by pleading for damages under the jurisdictional amount where a state rule prevents such pleading and where defendants are able to show that it is facially apparent that the amount in controversy exceeds $50,000.

In the case sub judice, plaintiffs also attached to the original state court petition an attorney affidavit that purported to limit the amount of damages recoverable. The federal district court reasoned, however, that the plaintiffs could not effectively limit the amount of damages they could obtain unless they had the authority to bind the estates by limiting damages. In order to do so, they had to be the legal representatives or legal heirs of the estates.

On this issue, plaintiffs' initial

argument is that Mexican law rather than Texas law should apply. Specifically, they assert that under Mexican law, they are the lawful heirs of the decedents and have lawful authority to limit the damages sought by the estates.

In a diversity action, a federal court must apply the choice-of-law rules of the state in which it sits. Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). According to Texas law, "in all choice-of-law cases, except those contract cases in which the parties have agreed to a valid choice-of-law clause, the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue." Duncan v. Cessna Aircraft Co., 665 S.W. 2d 414, 421 (Tex. 1984).

Texas follows RESTATEMENT (SECOND) of CONFLICT OF LAWS §6, which provides:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule for law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Furthermore, section 145 lists the

factual matters that a Texas court will consider when applying section 6:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, had the most significant relationship to the occurrence and the parties under the principles stated in §6.
>
> (2) Contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the

particular issue.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971); Crisman v. Cooper Indus., 748 S.W. 2d 273, 276-77 (Tex. App. -- Dallas 1988, writ denied).

Furthermore, the application of the significant relationship test does not "turn on the number of contacts, but more importantly on the qualitative nature of those contacts as affected by the policy factors enumerated in Section 6." Gutierrez v. Collins, 583 S.W. 2d 312, 318 (Tex. 1979).

Defendants apparently relied upon only Texas cases when arguing before the district court that Texas should apply, as plaintiffs did not argue that Mexican law should apply on this issue until they filed their motion to remand two months after removal. The district court, however, did address and reject the

choice-of-law argument in its memorandum opinion, and we follow suit.

We will first identify all relevant contacts as a Texas court would. Duncan, 665 S.W.2d at 421. All defendants conduct business in TEXAS, the forum is Texas, and the underlying cause of action is based upon Texas law. All of the plaintiffs are from Mexico, all decedents were from Mexico, and the crash itself and the injuries took place in Mexico. There is no particular relationship between the plaintiffs and the defendants.

The matter at issue is whether Texas or Mexican law will be used to determine the extent of plaintiffs' authority to limit damage recoveries for the estates. As noted, plaintiffs plainly are seeking damages under the Texas Survival Statute.

This "particular substantive issue" has nothing to do with the actual alleged

tort itself. Duncan, 665 S.W. 2d at 421 (the law of the place with the "most significant relationship to the particular substantive issue will be applied to resolve that issue"). In other words, the choice-of-law question in this case in unrelated to the conduct and injury underlying the cause of action in the same way, for example, the choice of the substantive products liability law of one of the places would be.[13] See, e.g.,

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[13]Obviously, in a tort case, the locus of the conduct has a greater interest in seeing that its standard of care is applied, because it affects the way that parties tailor their conduct in that state. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §145, cmt. d, at 417-18:

> Experience and analysis have shown that certain issues that recur in tort cases are most significantly related to states with which they have particular connections or contacts. So, for example, a state has an obvious interest in regulating the conduct of persons within its territory and in providing

Perry v. Aggregate Plant Prods. Co., 786 S.W. 2d 21 (Tex. App. -- San Antonio 1990, writ denied) (products liability law of Indiana applied to conduct and injury occurring in Indiana); Crisman (products liability law of Florida applies to conduct and injury occurring in Florida).

The fact that the accident took place in Mexico, or that there was an accident at all, is fortuitous and simply not

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> redress for injuries that occurred there. Thus, subject only to rare exceptions, the local law of the state where the conduct and injury occurred will be applied to determine whether the actor satisfied minimum standards of acceptable conduct and whether the interest affected by the actor's conduct was entitled to legal protection (see §§ 146-147).

The particular issue in our case is more akin to the situation where "a court under traditional and prevailing practice applies its own state's rules to issue involving process, pleadings, joinder of parties, and the administration of the trial. . . " Id. at 417.

relevant to our particular choice-of-law decision. Rather, the important fact is that the plaintiffs chose to file a suit in Texas under Texas law. Whether the plaintiffs could effectively limit the damage recovery to the estates of the decedents relates more directly to the "procedural" aspects of the suit and not to be substantive portions of the cause of action.[14]

Mexican has no underlying interest in the application of its law to determine who can bring a cause of action or bind the estate in a Texas cause of action. Texas certainly has an interest in requiring those who seek to take advantage of Texas law to meet certain requirements. In addition, uniformity and predictability

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[14]Strictly speaking, this not a procedural issue; otherwise, the federal procedure rules would apply.

in Texas courts would be promoted when deciding who has the authority to pursue actions on behalf of estates. This is a false conflict, and Texas law applies. See Duncan, 665 S.W. 2d at 422. In this situation, we have no doubt that a Texas court would choose to apply Texas law.

Plaintiffs originally claimed to be the personal representatives and legal heirs of the decedents' estates. Boeing's attempt to amend the Reich affidavit, and the conversations which followed, however, have called this claim into substantial doubt. In fact, plaintiffs appear essentially to have abandoned their claim as personal representatives and instead purport to be plaintiffs' legal heirs.

The plaintiffs can pursue their claims as the individual heirs of the estates under TEX. CIV. PRAC. & REM. CODE ANN. § 71.021 (Vernon's 1986). Legal

heirs can sue on behalf of an estate if they allege that "there is no administration [of the estate] pending and no necessity for same and that they are the only heirs (or devisees) of the deceased." Lozano v. Smith, 718 F. 2d 756, 773 n. 38 (5th Cir. 1983); see also Frazier v. Wynn, 472 S.W. 2d 750, 752 (Tex. 1971); Johnson v. Holly Farms, Inc., 731 S.W. 2d 641, 647 (Tex. App. -- Amarillo 1987, no writ).

Plaintiffs have not alleged any of these elements. They now argue that the district court erred in not requiring the defendants to offer evidence that the above elements could not be satisfied. Plainly, though, the rule is that the plaintiffs must affirmatively allege the above elements. See Johnson, 731 S.W. 2d at 647.

In any event, defendants did offer

evidence that the plaintiffs in this case are not the sole heirs. Forty-two persons alleged in De Aguilar I to be heirs of the decedents, as well as twenty minors, were dropped as plaintiffs. It appears that known heirs were deleted from this case because plaintiffs knew that they would not be able to limit the damage claim with these heirs as part of the action.[15] The one hundred "Doe" plaintiffs from the first action were also eliminated. The inclusion of "Doe" plaintiffs in De Aguilar I suggests that the plaintiffs' attorneys were not aware of who all of the heirs were, and the plaintiffs have contended nothing that appears to change this circumstance.

In fact, plaintiffs' attorney

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[15]For example, a court must approve the limiting of a claim when minors are involved.

acknowledged at oral argument that he does not represent all of the legal heirs. Defendant also argue that in a previous complaint, all of the present plaintiffs and all of the plaintiffs from De Aguilar I were included, and the plaintiffs still said that this was only a partial listing and that additional survivors would be named. Plaintiffs plainly have failed to meet the requirements of Texas law to limit the damages recoverable to the estate in this case. As a result, plaintiffs have failed to defeat removal jurisdiction.[16]

The judgment of the district court dismissing the complaint is AFFIRMED.

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[16]As this issue is dispositive, we find it unnecessary to address the issue of Boeing's third party complaint.

APPENDIX D

CAUSE NO. B-144,222

ALMA TORREBLANCA de AGUILAR, REPRESENTATIVE OF THE ESTATE OF DAVID ALBERTO AGUILAR CHAVEZ, DECEASED; IRENE de la LLATA VDA de ANZALDUA de la LLATA, DECEASED; ING. HERNAN BARRIOS, AS REPRESENTATIVE OF THE ESTATE OF MARIA GUADALUPE de la CARIDAD BARRIOS AVILES, DECEASED; JORGE FEDERICO ALTSCHULER CASTRO, AS REPRESENTATIVE OF THE ESTATES OF PILAR MENA DE ALTSCHULER DECEASED; MIRIAM ALTSCHULER MENA, DECEASED; ROQUE BAUTISTA FAJARDO, AS REPRESENTATIVE OF THE ESTATE OF MARIA ESTELA BAUTISTA ABARCA, DECEASED; SARAI HERNANDES BAUTISTA, DECEASED; AND DALIA HERNANDES BAUTISTA, DECEASED; AND ANA MARIA ESPERANZA CUELLAR	§	IN THE DISTRICT COURT OF JEFFERSON COUNTY, TEXAS 60th JUDICIAL DISTRICT

de BOURLON, AS §
REPRESENTATIVE OF §
THE ESTATE OF MARIA §
EMILIA BOURLON §
CUELLAR, DECEASED; §
ADELA CESPEDES de §
CORTINA, AS §
REPRESENTATIVE OF §
THE ESTATE OF MARIA §
del REFUGIO CORTINA §
CUELLAR, DECEASED; §
EDUARDO CALDERON AS §
REPRESENTATIVE OF §
THE ESTATE OF §
EDUARDO CALDERON §
ZAVALA, DECEASED; §
GLORIA CALDERON §
SOTOMAYOR DE §
BAUTISTA, DECEASED; §
CARLOS EDUARDO §
BAUTISTA CALDERON, §
DECEASED; AND LILIA §
BAUTISTA CALDERON, §
DECEASED, CARLOS §
de la TORRE §
DELGADILLO, AS §
REPRESENTATIVE §
OF THE ESTATE OF §
SYLVIA RIVERA PEREZ §
de la TORRE, §
DECEASED; JUAN de §
la O. GUZMAN, AS §
REPRESENTATIVE OF §
THE ESTATES OF §
HECTOR ARTURO §
de la O. §
MACIEL, DECEASED, §
YOLANDA BENITEZ §
de la O., DECEASED; §
AND HECTOR ARTURO §
de la O. BENITEZ, §

DECEASED; ESPERANZA §
ESTAVILLO DIAZ AND §
LUZ MARIA ESTAVILLO §
DIAZ, AS §
REPRESENTATIVES OF §
THE ESTATES OF §
HORACIA ESTAVILLO §
LAGUNA, DECEASED; §
MARIA de la §
LUZ DIAZ de §
ESTAVILLO, §
DECEASED; AND §
HORACIO ESTAVILLO §
DIAZ, DECEASED; §
LUIS GOMEZ DAZA §
RANGEL, AS §
REPRESENTATIVE OF §
THE ESTATE OF §
ADELA GOMEZ §
DAZA CORTINA, §
DECEASED; MARIA §
CONCEPCION GOMEZ §
HERNANDEZ, AS §
REPRESENTATIVE OF §
THE ESTATE §
OF JESUS GOMEZ §
HERNANDEZ, §
DECEASED; AND §
TERESA HERNANDEZ §
de GOMEZ, DECEASED; §
DAVID L. JASQUI §
ELO AS §
REPRESENTATIVE §
OF THE ESTATES OF §
JACOBO JASQUI §
DEBBAH (DERBAH), §
DECEASED; RAQUEL §
NOAH de §
JASQUI, DECEASED; §
SOFIA JASQUI §
NOAH, DECEASED; §

TERESA JASQUI NOAH, §
DECEASED; AND DAVID §
JASQUI NOAH, §
DECEASED; §
JOHN EHRHARD KOHN §
CORNEJO, AS §
REPRESENTATIVE OF §
THE ESTATE OF §
CATIA (KATIA) §
KOHN PAZ de §
HERNANDEZ, §
DECEASED; §
MARIA MONICA §
RIVERO, la §
FUENTE de LUENGAS, §
AS REPRESENTTIVE §
OF THE §
ESTATE OF PALMIRA §
de la FUENTE §
RIVERO, §
DECEASED; ALEJANDRO §
MA GUADALUPE MERINO §
CASARIN, AS §
REPRESENTATIVE OF §
THE ESTATE OF §
OFELIA CASARIN §
ALCIBAR, §
DECEASED; JESUS §
ERNESTO MERINO §
ORTIZ, AS §
REPRESENTATIVE OF §
THE ESTATES §
OF MARGARITA §
dl TORAL MERINO, §
DECEASED; MAGARITA §
MERINO del TORAL, §
DECEASED; AND §
MONICA MERINO de §
TORAL, DECEASED; §
ING. EDEL §
OJEDA MALPICA, AS §

REPRESENTATIVE OF §
THE ESTATE OF §
LUIS ENRIQUE OJEDA §
SANTANA, DECEASED; §
GUILLERMO PIERDANT §
PEREZ, AS §
REPRESENTATIVE OF §
THE ESTATE OF §
HIGINIO §
PERIDANT QUIROZ, §
DECEASED; MARIA §
DOLOREZ §
ROSALES DIAZ, AS §
REPRESENTATIVE OF §
THE ESTATES OF §
JULIA DIAZ §
COBIAN de §
ROSALES, DECEASED; §
AND NATAEL GERARDO §
ROSALES FLORES; §
DECEASED; DAVID §
RODRIQUEZ DIAZ, §
AS REPRESENTATIVE §
OF THE ESTATES OF §
IMELDA ZALDIVAR §
MORENO de §
RODRIQUEZ, §
DECEASED; ANABEL §
RODRIQUEZ ZALDIVAR, §
DECEASED; MA §
GABRIELA RODRIQUEZ §
ZALDIVAR, DECEASED; §
JOSEFINA ROMERA de §
MATAGNE, AS §
REPRESENTATIVE OF §
THE ESTATE OF §
GENOVENA §
BAUMGARTEN de §
BAUMGARTEN, §
DECEASED; MARIA §
TERESA SANTOS §

MUNOZ de CASTRO, §
AS REPRESENTATIVE §
OF THE ESTATE OF §
AGUSTIN CASTRO §
DIAZ, DECEASED; §
DELFINA GRACIELA §
TOVAR VDA de SOSA, §
AS REPRESENTATIVE §
OF THE ESTATE OF §
ENRIQUE ALEJANDRO §
SOSA ROJAS, §
DECEASED; LIC §
FERNANDO YZUNZA §
BRENA, AS §
REPRESENTATIVE §
OF THE ESTATE §
OF FEDERICO §
YZUNZA BRENA, §
DECEASED; CAROLINA §
HUITRON §
ESPINOZA de YTUARDE §
AS REPRESENTATIVE §
OF THE ESTATE §
OF AGUSTIN YTUARDE §
SALAZAR, DECEASED §
OCTAVIO QUESNEL §
AND GRACIELA GALVAN §
de QUESNEL, AS §
REPRESENTATIVES OF §
THE ESTATE OF §
OF AMELA FLORENCIA §
QUESNEL GALVAN, §
DECEASED; MONICA §
COWLAND, AS §
REPRESENTATIVE §
OF THE ESTATE §
OF PETER MILES §
COWLAND, DECEASED; §
SOFIA LARTILLEUX §
AS REPRESENTATIVE §
OF THE ESTATES §

OF AYMERIC J. §
LARTILLEUX, §
DECEASED, CHANTAL §
LARTILLEUX, §
DECEASED; ELIZABETH §
LARTILLEUX, §
DECEASED; ERIC §
LARTILLEUX, §
DECEASED; PIERRE §
LARTILLEUX, §
DECEASED, VIRGINIA §
LARTILLEUX, §
DECEASED, XAVIER §
LARTILLEUX, §
DECEASED; AND §
PIERRE LARTILLEUX, §
JR., DECEASED; §
PAUL RENEE PIAGET, §
AS REPRESENTATIVE §
OF THE ESTATE §
OF PHILIP LEWIS §
PIAGET RHORER, §
DECEASED; JAMIE §
GUZMAN VAZQUEZ, §
AS REPRESENTATIVE §
OF THE ESTATE OF §
ANA ROSA GUZMAN §
FLORES, DECEASED; §
CARLOS ALBERTO §
GUADARRAMA, SR. §
AS REPRESENTATIVE §
OF THE ESTATE OF §
CARLOS ALBERTO §
GUADARRAMA, §
DECEASED; DR. §
ROBERTO PINO §
LOZANO, AS §
REPRESENTATIVE §
OF THE ESTATE §
OF HAYDEE LOZANO §
de PINON, DECEASED; §

DR. ROBERTO PINON LOZANO AS REPRESENTATIVE OF THE ESTATE OF ROBERTO PINON PEREZ DECEASED; AND JAMIE CUKIER AS REPRESENTATIVE OF THE ESTATES OF GOLD SHVEID DE CUKIER, DECEASED; ABRAHAM CUKIER SHVEID, DECEASED; ILAN CUKIER SHVEID, DECEASED; AND URI CUKIER SHVEID, DECEASED	§
PLAINTIFFS.	§
VS.	§
THE BOEING COMPANY, THE B.F. GOODRICH COMPANY, THE GOODYEAR TIRE AND RUBBER COMPANY, DELTA AIR LINES, INC., AND PARKER HANNIFIN CORPORATION,	§
DEFENDANTS.	§

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs bring this action as

personal representatives of the estates of each decedent named below, in their capacity as representatives of the estates of the decedent and complain of the Boeing Company, The B.F. Goodrich Company, The Goodyear Tire & Rubber Company, Delta Air Lines, Inc. and Parker-Hannifin Corporation, Defendants, and for cause of action would show unto the Court the following:

I.

Plaintiffs bring this suit pursuant to Section 71.031 of the Texas Civil Practices and Remedies Code which allows citizens of a foreign country to maintain a survival cause of action in the courts of Texas. Plaintiffs have complied with all procedural and substantive requisites of Section 16.064 of the Texas Civil Practices and Remedies Code which allows for tolling of the applicable statute of

limitations period upon dismissal of an action due to lack of jurisdiction. Plaintiffs are representatives of the estates of descendants and bring this action pursuant to Section 71.021 of the Texas Civil Practices and Remedies Code, commonly known as the Survival Statute. Their names and relationship to decedent are as follows:

DECEDENT	REPRESENTATIVE	RELATION TO DECEDENT
David Alberto Aguilar Chavez	Alma Torreblanca Aguilar	Wife
Carmen Anzaldua de la Llata	Irene de la Llata VDA de Anzaldua	Mother
Maria Guadalupe de la Caridad	Ing. Hernan Barrios	Brother
Pilar Mena de Altschuler	Jorge Federico Altschuler Castro	Husband
Miriam Altschuler Mena	"	Father
Alejandro Altschuler Mena	"	Father

Maria Estela Bautista Abaraca	Roque Bautista Fajardo	Brother
Sarai Hernandes Bautista	"	Uncle
Dalia Hernandes Bautista	"	Uncle
Maria Emilia Bourlon Cuellar	Ana Maria Esperanza Cullar de Bourion	Mother
Maria del Refugio Cortina Cuellar	Adela Cespedes de Cortina	Mother
Eduardo Calderon Zavala	Eduardo Calderon Sotomayor	Father
Gloria Calderon Sotomayor de Bautisa	"	Brother
Carlos Eduardo Bautista Calderon	"	Uncle
Lilia Bautista Calderon	"	Uncle
Sylvia Rivera Perez de la Torre	Carlos de la Torre Delgadillo	Husband
Hector Arturo de la O. Maciel	Juan de la O. Guzman	Father
Yolanda Benitez de la O.	"	Father-in-Law
Hector Arturo de la O. Benitez Sister	"	Grandfather

Horacia Estavillo Laguna	Experanza Estavillo Diaz	Daughter
Maria de la Luz Diaz de Estavillo	Luz Maria Estavillo Diaz	Daughter
Horacio Estavillo Diaz	"	Sister
Adela Gomez Daza Cortina	Luis Gomez Daza Rangel	Father
Jesus Gomez Hernandez	Maria Concepcion Gomez Hernandez	Daughter
Teresa Hernandez de Gomez	"	Daughter
Jacobo Jasqui Derbah (Debbah)	David L. Jasqui Elo	Father
Raquel Noah de Jasqui	"	Father-in-Law
Sofia Jasqui Noah	"	Grandfather
Teresa Jasqui Noah	"	"
David Jasqui Noah	"	"
Catia (Katia) Kohn Paz de Hernandez	John Ehrhard Cornejo	Father
Palmira de la Fuente Rivero	Maria Monica la Fuente de Luengas	Daughter
Ofelia Casarin Alcibar	Alejandro MA Guadalupe Merino Casarin	Daughter

Margarita del Toral Merino	Jesus Ernesto Merino Ortiz	Husband
Margarita Merino del Toral	"	Father
Celia Merino del Toral	"	Father
Monica Merino del Toral	"	Father
Luis Enrique Ojeda Santana	Ing. Edel Ojeda Malpica	Father
Higinio Pierdant Quiroz	Guillermo Pierdant Perez	Uncle
Julia Diaz	Maria Dolorez Rosales Diaz	Daughter
Natael Gerardo Rosales Flores	"	"
Imelda Zaldivar Moreno de Rodriquez	David Rodriquez Diaz	Husband
Anabel Rodriquez	"	Father
MA Gabriela Rodriguez Zaldivar	"	Father
Genoveva Baumgarten de Baumgarten	Josefina Romerro de Matagne	Niece
Agustin Castro Diaz	Maria Teresa Santos Munoz de Castro	Wife
Enriquie Alejandro Sosa Rojas	Delfina Graciela Tovar VDA de Sosa	Wife

Federico Yzunza Brena	LIC Fernando Yzunza Brena	Brother
Agustin Ytuarde Salazar	Carolina Huitron Expinoza de Ytuarde	Wife
Amelia Florencia Quesnel Galvan	Octavio Quensel	Father
"	Graciela Galvan de Quesnel	Mother
Peter Miles Cowland	Monica Cowland	Wife
Aymeric J. Lartilleux	Sofia Lartilleux	
Chantal Lartilleux	"	
Elizabeth Lartilleux	"	
Eric Lartilleux	"	
Pierre Latilleux	"	
Virgina Lartilleux	"	
Xavier Lartilleux	"	
Natalie Lartilleux	"	
Pierre Lartilleux, Jr.	"	
Philip Lewis Piaget Rhorer	Paul Renee Piaget	
Ana Rosa Guzman Flores	Jaime Guzman Vazquez	
Carlos Alberto Guadarrama	Carlos Alberto Guadarrama, Sr.	Father

Haydee Lozano de Pinon	Dr. Roberto Pinon Lozano	Son
Roberto Pino Perez	"	Son
Gold Shveid de Cukier	Jaime Cukier	Husband
Abraham Cukier Shveid	"	Father
Ilan Cukier Shveid	"	Father
Uri Cukier Shveid	"	Father

II.

Defendant, The Boeing Company, is a Delaware Corporation registered to do business in the state of Texas, and may be served with process by serving C.T. Corporation System, 350 North St. Paul, Dallas, Texas 75201.

Defendant, The B.F. Goodrich Company, is a New York Corporation registered to do business in the state of Texas, and may be served with process by serving C.T. Corporation System, 350 North St. Paul, Dallas, Texas 75201.

Defendant, The Goodyear Tire & Rubber

Company, is an Ohio Corporation registered to do business in the state of Texas, and may be served with process by serving C.T. Corporation System, 350 North St. Paul, Dallas, Texas 75201.

Defendant, Delta Air Lines, is a Delaware Corporation registered to do business in the state of Texas, and may be served with process by serving C.T. Corporation System, 350 North St. Paul, Dallas, Texas 75201.

Defendant, Parker-Hannifin Corporation, is an Ohio Corporation registered to do business in the state of Texas, and may be served with process by serving C.T. Corporation System, 350 North St. Paul, Dallas, Texas 75201.

III.

On or about March 31, 1986, all of the above decedents were aboard a Boeing B-727-264, Mexicana Airlines Flight 940,

when it crashed shortly after its takeoff from Mexico City due to a combination of brake system failure, deboost valve failure and tire explosion and killed all persons aboard. The subject aircraft was manufactured by the Boeing Company. Defendant B.F. Goodrich Tire and Rubber Company manufactured tires and other component parts of thE subject aircraft. Defendant Delta Air Lines, Inc. maintained, or was the successor corporation to the entity which maintained, the subject aircraft's landing gear and brakes. Defendant Parker-Hannifin Corporation manufactured, or was the successor corporation which manufactured component parts, including reduction valves or deboost valves for the brake assembly hydraulic system, of the subject aircraft.

IV.

Plaintiffs would show that Defendants were in the business of designing, marketing, testing, selling and placing into the stream of commerce aircraft and component parts of aircraft such as the one involved in this incident and, as a result, had a duty to make certain that such products were not defective. The aircraft involved in this incident, however, was in a defective condition and was unreasonably dangerous at the time that it was manufactured, sold distributed and otherwise placed into the stream of commerce by Defendants. Plaintiffs would show that the aircraft's manufacture and/or design defects were a producing cause of the occurrence in question subjecting Defendants to liability as set forth in Section 402A of the Restatement of Torts (Second). Plaintiffs would

further show that Defendants warranted and represented that this product, including each component, was proper, safe, and suitable for its intended purpose and use. However, Defendants breached such warranties and representations, both implied and expressed, subjecting said Defendants to liability for breach of the same and to strict liability as set forth in Section 402B of the Restatement of Torts (Second).

V.

Plaintiff would show that the aircraft involved in this litigation was unsafe for its intended purposes, and therefore defective, at the time it left the control of Defendants. The aircraft was defectively designed, manufactured, and unreasonably dangerous in that its design incorporated an inadequate, inappropriate, and/or defective tire.

Further, the design of the aircraft did not incorporate any sort of accommodation which would prevent catastrophic failure of the aircraft in the event of a tire explosion. Plaintiffs, therefore, invoke the doctrine of strict liability as set forth in Section 402A of the Restatement of Torts (Second). Plaintiffs would further show that the defects in design and manufacture were a producing cause of their injuries and damages as set forth below.

VI.

Plaintiffs would show that the component parts, including the tire which exploded and the pressure reduction valves (deboosters) of the brake system were themselves defective and unsafe for their intended purposes at the time they left the control of Defendants. Therefore, Plaintiffs invoke the doctrine of strict

liability as set forth in Section 402A of the Restatement of Torts (Second). Plaintiffs would further show that this defect in design was a producing cause of the injuries and damages set forth below.

VII.

Plaintiffs would show that the design and manufacture of the aircraft and the component parts involved in this incident were defective in that instructions, manuals, sales brochures and sales materials failed to give adequate warnings of the hazard of aircraft and passengers should the aircraft's tires be filled with air as opposed to nitrogen. Plaintiffs would further show that this defect was a producing cause of their injuries and damages set forth below.

VIII.

Defendant expressly and impliedly warranted to the public generally that the

aircraft and component parts involved in this incident were of merchantable quality and were safe and fit for their intended purposes and used under ordinary conditions and in an ordinary manner. Plaintiffs' decedents relied upon these warranties and suffered the injuries and damages set forth below as proximate result of the breach of these warranties.

IX.

Plaintiffs would show that Defendants were negligent in that they failed to warn that the tire involved in this incident would tend to explode when filled with air rather than nitrogen. Plaintiffs would further show that the Defendants' negligence in this regard was a producing cause of the injuries and damages set forth below.

X.

Plaintiffs would show that Defendants

were negligent in failing to warn, instruct and safety check the subject aircraft's brake, wheel, wheel-well compartment, fuel lines, and hydraulic lines and other components of the subject aircraft away from the hazard created by a foreseeable tire explosion. Plaintiffs would further show that Defendants' negligence in this regard was a producing cause of the injuries and damages set forth below.

XI.

Plaintiffs would show that Defendants were negligent in failing to inspect and test the aircraft and component parts involved in this incident before making it available for use by the public. Had proper inspection been made, the defects and dangers inherent in the aircraft would have, in all likelihood, been discovered.

XII.

Plaintiffs would show that Defendants were negligent in failing to adequately maintain the aircraft involved in this incident. Had the aircraft been properly maintained, the defects and dangers inherent in the aircraft would have, in all likelihood, been discovered.

XIII.

Plaintiffs would show that Defendants were negligent in the design of the aircraft involved in this incident. Had the aircraft been designed to prevent catastrophic failure in the event of a tire explosion, in all likelihood the subject incident would have been prevented. All of the above acts and omissions of negligence and the design, manufacturing, and/or marketing defects on the part of these Defendants were a proximate cause of the incident in

question which resulted in Plaintiffs' injuries and damages as set forth below.

XV.

As a direct and proximate result of the negligent acts, omissions, failure, and conditions created by Defendants in the defective and unreasonably dangerous condition of the aircraft made the basis of Plaintiffs' lawsuit, decedents suffered the following damages:

1) The above-named decedents, during the flight of the subject aircraft leading up to the crash, suffered mental anguish due to fear of death, mental anguish and pain and suffering, the value of which will not exceed $50,000 per decedent.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that Defendants be cited to appear and answer, and on final

trial, Plaintiffs have:

1) Judgment against Defendants for a sum not to exceed $50,000 per decedent exclusive of interest and court costs;

2) Prejudgment and post-judgment interest as provided by law;

3) Costs of suit.

Plaintiffs further attach an affidavit of Dennis Reich clearly stating that each decedent's damages are within the jurisdictional amounts of the County Court at Law of Jefferson County, Texas and that each decedent's damages do not exceed $50,000 exclusive of interest and court costs. Dennis Reich's affidavit is attached hereto as Exhibit "A" and incorporated herein as if set forth herein.

Respectfully submitted,

Weller, Wheelus & Green
P.O. Box 350
Beaumont, TX 77704-0350
(409) 838-0101
(409) 838-6780 (Fax)

BY: /S/
MITCHELL A. TOUPS
STATE BAR NO. 20151600

BY: /S/
DENNIS REICH
STATE BAR NO. 16739600
4265 San Felipe
Suite 620
Houston, TX 77027

ATTORNEYS FOR PLAINTIFFS

JURY DEMAND

Plaintiff respectfully request a trial by jury.

BY: /S/
MITCHELL A. TOUPS

A F F I D A V I T

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority on this day personally appeared DENNIS C. REICH, who, being by me here and now duly sworn, deposed and says as follows:

"My name is DENNIS C. REICH. I am over twenty-one years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the attorney for each Plaintiff identified in the preceding Petition. I hereby judicially admit that each claim on behalf of each decedent I represent as a result of the crash of the Boeing 727-S64, Mexican Airlines, Flight 944, is less than fifty thousand dollars ($50,000.00) exclusive of interest and court costs.

Each decedent hereby irrevocably agrees that the amount of damages claimed on their behalf in this action will forever be less than fifty thousand dollars ($50,000.00) exclusive of interest and court costs. Plaintiffs hereby irrevocably agrees to the entry of an order of court which places an irrevocable cap upon the amount of damages which may be sought by or awarded to Plaintiffs in this case. This cap should be set as fifty thousand dollars ($50,000.00) exclusive of interest and court costs.

Plaintiffs agree, acknowledge, and understand that this stipulation is binding upon them and cannot rescinded or revoked under any circumstances regardless of any developments which may occur during the investigation, discovery, pretrial or trial of this action.

I have personal knowledge of each

fact set forth herein and they are true and correct"

/s/
DENNIS C. REICH

SUBSCRIBED AND SWORN TO before me by the said DENNIS C. REICH on this 28th day of October, 1992, to certify which witness my hand and seal of office.

NOTARY PUBLIC,
STATE OF TEXAS

My Commission Expires:

8/22/96

Marilyn A. Kincaid
Typed of Printed
Name of Notary

APPENDIX E

PINON LOZANO AS REPRESENTATIVE OF THE ESTATE OR ROBERTO PINON PEREZ, DECEASED; AND JAIME CUKIER, AS REPRESENTATIVE OF THE ESTATES OF GOLD SHVIED de CUKIER, DECEASED; ABRAHAM CUKIER SHVEID, DECEASED; ILAN CUKIER SHVEID, DECEASED; AND URI CUKIER SHVEID, DECEASED	§
PLAINTIFFS.	§
VS.	§
THE BOEING COMPANY, THE B.F. GOODRICH COMPANY, THE GOODYEAR TIRE AND RUBBER COMPANY, DELTA AIR LINES, INC. AND PARKER HANNIFIN CORPORATION,	§
DEFENDANTS.	§

DEFENDANTS' NOTICE OF REMOVAL

TO: CLERK, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

AND TO: PLAINTIFFS ALMA TORREBLANCA DE AGUILAR, ET AL;

AND TO: DENNIS C. REICH, ATTORNEY AT LAW
4265 San Felipe, Suite 620
Houston, TX 77027
Plaintiffs' Attorney

AND TO: MITCHELL A. TOUPS
WELLER, WHEELUS & GREEN
550 Fannin 5th Floor
Beaumont, TX 77701

COME now defendants The Boeing Company, The B.F. Goodrich Company, The Goodyear Tire and Rubber Company, Delta Air Lines, Inc., and Parker Hannifin Corporation and hereby give notice of removal of the above-captioned action, and in support thereof state as follows:

BASIS FOR REMOVAL

I.

This is a civil action arising from the crash of Mexicana Airlines Flight 940 in the mountains west of Mexico City on March 31, 1986. The civil action was filed in the District Court of Jefferson County, Texas on November 5, 1992, and assigned Cause No. B-144,222. The 38 named plaintiffs assert that they are the "personal representatives of the estates"

of 69 passengers killed in the crash. Plaintiffs' Original Petition alleged negligence and product liability claims on behalf of those 38 named plaintiffs against The Boeing Company, The B.F. Goodrich Company, the Goodyear Tire and Rubber Company, Delta Air Lines, Inc. and Parker Hannifin Corporation.

II.

On information and belief, none of the plaintiffs are citizens of any state of the United States; all are foreign nationals residing outside the United States, primarily in Mexico. Pursuant to 28 U.S.C. § 1332(c)(2), the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same state as the decedent. On information and belief, none of the decedents whose estates are represented by plaintiffs were citizens of any state of

the United States; like the plaintiffs, all decedents were foreign nationals residing outside the United States, primarily in Mexico.

III.

The defendants are citizens of the following states:

Defendant	State of Incorporation	Principal Place of Business
Boeing	Delaware	Washington
B.F. Goodrich	New York	Ohio
Goodyear Tire	Ohio	Ohio
Delta Air Lines	Delaware	Georgia
Parker Hannifin	Ohio	Ohio

None of the defendants is a citizen of Texas.

IV.

On a reasonable reading of the record, each claim on behalf of a decedent's estate involves an amount in controversy in excess of $50,000.00 exclusive of interest and costs. Plaintiffs' claims are based on § 71.021

of the Texas Civil Practices & Remedies Code, commonly known as the Survival Statute. Plaintiffs claim that the decedents, "during the flight of the aircraft leading up to the crash, suffered mental anguish due to fear of death, mental anguish and pain and suffering." The nature of the damages alleged is such that a judgment in excess of $50,000 per decedent, exclusive of interest and costs, is a reasonably possibility.

V.

Plaintiffs' purport to limit the amount in controversy by stating in their petition that the value of the damages sought by each decedent's estate will not exceed $50,000 and by appending to the petition an affidavit of plaintiffs' attorney stating that each claim on behalf of each decedent is for less than $50,000 exclusive of interest and court costs.

However, as detailed below, despite an allegation in the petition that "[p]laintiffs bring this action as personal representatives of the estates of each decedent named below," none of the plaintiffs have in fact been appointed as personal representatives of the estate of the decedent(s) whose rights they purport to represent. Thus, no plaintiff has the authority to limit the substance or amount of claims on behalf of the decedent's estates. Plaintiffs' attempts to do so are meaningless and must be disregarded in determining the amount in controversy in this matter.

VI.

By letter dated November 25, 1992, counsel for defendant The Boeing Company tendered an affidavit to plaintiffs' attorney, Dennis C. Reich, for his signature, asking him to confirm, among

other things, that plaintiffs had the necessary authority to limit the claims of each decedent's estate to no more than $50,000, and that plaintiffs' attorneys had been authorized by plaintiffs to make a binding admission on their behalf. A copy of the letter and accompanying affidavit is Attachment 1 to the Affidavit of Howard L. Close, which is attached hereto as Exhibit A. The proposed affidavit requested plaintiffs' attorney to attest in pertinent part that:

> Each Plaintiff identified in the Petition in this matter has been appointed by a qualified court as a personal representative of the estate(s) of the decedent(s) whose rights he or she purports to represent.

Proposed Affidavit, Attachment 1 to the affidavit of Howard L. Close, Exhibit A hereto.

VII.

On or about December 4, 1992,

plaintiffs' attorney, Mitchell A. Toups, advised counsel for defendant The Boeing Company, Howard L. Close, that plaintiffs' attorneys could not sign the affidavit in the form tendered by Boeing because (1) none of the plaintiffs had been appointed as personal representatives of the estate of the decedent(s) whose rights they purported to represent (even though Plaintiffs' Original Petition alleged that each plaintiff had this status); and (2) none of plaintiffs' attorneys in this action (including Mr. Reich, who executed the affidavit appended to Plaintiffs' Petition) had actually communicated with plaintiffs on any of these subjects; their information come solely from attorneys in Mexico. Affidavit of Howard L. Close ¶ 4. Plaintiffs' attorneys sent counsel for defendant Boeing handwritten revisions to the proposed affidavit, whereby they

proposed to delete in its entirety the statement that each plaintiff has been appointed by a qualified court as a personal representative of the estate of the decedent(s) whose rights he or she purports to represent as well as to delete any referenced to each plaintiff having "expressly" authorized plaintiffs' attorneys to limit the amount of damages claimed, or to plaintiffs having confirmed "to me [Mr. Reich]" that they understood they were making an irrevocable commitment. A copy of plaintiffs' handwritten revisions to the proposed affidavit is Attachment 2 to the Affidavit of Howard L. Close, Exhibit A hereto.

VIII.

Since plaintiffs were not at the time Plaintiffs' Original Petition was filed, and are not now, properly appointed personal representatives of the estates of

the decedent(s) whose rights they purport to represent, neither plaintiffs, nor plaintiffs' attorneys, have the authority to limit the amount claimed by the estate of any decedent. The purported agreement of plaintiffs and their attorneys to limit the damages sought is meaningless and has no bearing on the amount in controversy in this matter.

IX.

Based on the foregoing facts, this Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332. Removal of this action is therefore proper under 28 U.S.C. § 1441(a), which authorizes removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction....," and 28 U.S.C. § 1441(b).

TIMELINESS OF REMOVAL

X.

A copy of the citation and Plaintiffs' Original Petition ("The Complaint"), the initial pleading setting forth plaintiffs' claim for relief, were served upon each defendant in this action on November 12, 1992. Certified copies of the citations (reduced in size) and the complaint as well as the docket sheet and all pleadings filed in the state court as well as the docket sheet and all pleadings filed in the state court are attached as Exhibit "B" pursuant to 28 U.S.C. § 1446(a). Because this Notice of Removal is being filed within 30 days after service of the complaint, removal is timely under 28 U.S.C. § 1446(b).

VENUE OF REMOVED ACTION

XI.

Because this Court is the United

States District Court for the district and division embracing the place where the state court action is pending, it is the appropriate court for removal under 28 U.S.C. § 1441(a).

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was forwarded to all counsel of record on this the 11th day of December, 1992.

Respectfully submitted,

/s/

Howard L. Close
State Bar #04406500
ORGAIN, BELL & TUCKER, L.L.P.
470 Orleans Street
Beaumont, TX 77701
(409) 838-6412
FAX 409/838-6959

ATTORNEYS FOR DEFENDANT,
THE BOEING COMPANY

/s/

Gerald L. Bracht
TX Bar No. 02806000
MAYOR, DAY, CALDWELL & KEETON, L.L.P.
1900 NCNB Center
700 Louisiana
Houston, TX 77002
(713) 222-7035
FAX # 713-225-7047

ATTORNEYS FOR DEFENDANTS, THE B.F. GOODRICH COMPANY AND THE GOODYEAR TIRE AND RUBBER COMPANY

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ALMA TORREBLANCA DE AGUILAR, ET AL	§	
	§	
VS.	§	CIVIL ACTION
THE BOEING COMPANY, ET AL.	§	NO. 1-92CV-014

AFFIDAVIT OF GUADALUPE BISTRAIN

BEFORE ME, the undersigned authority, on this day personally appeared GUADALUPE BISTRAIN, who after being be my first duly sworn, stated upon her oath as follows:

> "My name is GUADALUPE BISTRAIN. I am over the age of 18 years of age and am personally knowledgeable about the facts set out in this affidavit. I am an attorney licensed to practice law in the Country of Mexico, and have never been convicted of a felony or a crime of moral turpitude.
>
> I am the Mexican counsel for all Plaintiffs identified in Plaintiff's Original Petition. I have received explicit authority from each of the plaintiffs named in the above-captioned lawsuit to limit their damages to no more than FIFTY THOUSAND AND NO/100 DOLLARS ($50,000.00)(U.S. Currency) per

decedent, exclusive of court costs and interests. Each of the named plaintiffs identified in the above-captioned lawsuit are authorized to sue in their capacity as an heir at law and/or personal representative for each of the respective decedents identified in Plaintiffs Original Petition filed under the style and cause number referenced above.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct."

Executed this 2nd day of March, 1993.

/s/
GUADALUPE BISTRAN

STATE OF TEXAS §
§
COUNTY OF JEFFERSON §

AFFIDAVIT

Before me, the Undersigned Authority, personally appeared Mitchell A. Toups, who being by me duly sworn, deposes and says as follows:

> "My name is Mitchell A. Toups. I am of over 21 years of age, of sound mind, capable of making this Affidavit, and personally acquainted with the facts herein stated:
>
> I am an attorney with the law firm of WELLER & GREEN, L.L.P., 550 Fannin Street, Beaumont, TX 77701. I am an attorney of record in the case entitled Alma Torreblanca de Aguilar, et al v. The Boeing Company, et al. On or about December 4, 1992, I had a telephone conversation with Howard Close, attorney for the Boeing Company. Mr. Close and I had a conversation about an affidavit which he wanted Dennis Reich to sign so that they could be protected from a later amendment as to damages. I informed Mr. Close that it was not necessary for each plaintiff to have been appointed by a qualified court as personal representative of the estate since an heir of the estate can bring forth the claims of the

decedent. I further advised Mr. Close that whether or not the individual is the rightful individual to bring a survivalship cause of action has nothing to do with the amount in controversy."

"The above referenced facts are based on personal knowledge and are true and correct."

/s/

MITCHELL A. TOUPS

SWORN TO AND SUBSCRIBED by me on this 1ST day of February, 1993, to certify which witness my hand and seal of office.

NOTARY PUBLIC-STATE OF TEXAS

APPENDIX G

STATUTE 1332
DIVERSITY OF CITIZENSHIP;
AMOUNT IN CONTROVERSY; COSTS

(a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between-

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section

1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Feral courts is fully adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title-

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the

estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

(June 25, 1948, c. 646,62 Stat.930; July 25, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 4, 1964, Pub.L. 88-439, § 1, 78 Stat. 445; Oct. 21, 1976, Pub.L. 94-583, § 3, 90 Stat. 2891; Nov. 19, 1988, Pub.L. 100-702, Title II, 201(a), 202(a), 203(a), 102 Stat. 4646).

(3)

Supreme Court, U.S.
FILED
AUG 9 1995
CLERK

No. 95-102

In the

Supreme Court of the United States

October Term, 1995

ALMA TORREBLANCA DE AGUILAR, et al.,

Petitioners,

v.

THE BOEING COMPANY, et al.,

Respondents,

v.

COMPANIA MEXICANA DE AVIACION, S.A.,

Third-Party Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT THE BOEING COMPANY

V.L. Woolston*
Scott F. Seablom
PERKINS COIE
1201 Third Avenue, 40th Floor
Seattle, Washington 98101-3099
(206) 583-8888
Attorneys for Respondent The Boeing Company
*Counsel of Record

August 10, 1995

AUG 9 1995
FILED
Supreme Court, U.S.

BEST AVAILABLE COPY

QUESTIONS PRESENTED

By ruling that plaintiffs — some of the heirs of 69 decedents killed in an airplane accident in Mexico — had not in good faith sued for less than the amount required for diversity jurisdiction, did the court of appeals render a decision in conflict with the decision of another court of appeals on the same matter or so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, where:

- it was facially apparent that the damages sought on behalf of decedents' estates under the Texas Survival Statute rose to a level above $50,000 per decedent;

- the Notice of Removal set forth the grounds for concluding that the amount in controversy exceeded $50,000 per decedent;

- the prayer for damages less than the jurisdictional limit was improper and meaningless under Rule 47 of the Texas Rules of Civil Procedure, leading the court of appeals to conclude that plaintiffs were engaged in "manipulation" of the pleadings; and

- plaintiffs' claim that they were personal representatives of the decedents' estates was shown to be false, and plaintiffs, as only some of the decedents' heirs, lacked the authority to limit the damages claimed by the estates.

PARTIES

Petitioners' identification of the parties omits the third-party defendant-respondent Compania Mexicana de Aviacion, S.A. ("Mexicana").

The identity of petitioners, whose names do not appear in the caption and are not set forth in the list of parties in the Petition, are listed in the caption of Plaintiffs' Original Petition, Appendix D of Appendices to Petition for Writ of Certiorari (hereinafter "Pet. App.") at A79-86.

Petitioners' identification of the parties lists a number of attorneys and law firms, none of whom is a party to these proceedings.

STATEMENT TO COMPLY WITH RULE 29.1

The Boeing Company has no parent company and no subsidiary companies that are not wholly owned.

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No. 95-102

In the

Supreme Court of the United States

October Term, 1995

ALMA TORREBLANCA DE AGUILAR, et al.,

Petitioners,

v.

THE BOEING COMPANY, et al.,

Respondents,

v.

COMPANIA MEXICANA DE AVIACION, S.A.,

Third-Party Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT THE BOEING COMPANY

OPINIONS BELOW

Petitioners' appendices omit a paragraph of the district court's Order Granting Defendant's Motion to Dismiss Based on Forum Non Conveniens. Pet. App. B. The complete Order is reproduced as Appendix A to Respondent Boeing's Brief in Opposition (hereinafter "Boeing App.").

Petitioners' citation to the decision of the court of appeals whose judgment is sought to be reviewed is incorrect. The correct citation is *de Aguilar v. Boeing Co.*, 47 F.3d 1404 (5th Cir. 1995).

STATEMENT OF THE CASE

Petitioners are 38 of the heirs of 69 foreign nationals, primarily from Mexico, who died when a Boeing 727 that was operated by Mexicana crashed outside of Mexico City on March 31, 1986. Original Petition, Pet. App. D at A88-93. The passengers and crew on board the aircraft were predominantly Mexican nationals. All were killed. Record on Appeal ("Rec.") at 429-35.

Petitioners are claiming damages for the decedents' pre-death "mental anguish and pain and suffering" pursuant to the Texas Survival Statute, Tex. Civ. Prac. & Rem. Code Ann. § 71.021 (Vernon 1986). Original Petition, Pet. App. D at A88, A103-04. An agency of the Mexican government investigated the accident and concluded that when the aircraft was at approximately 30,000 feet an explosion occurred in the aircraft's wheel well, followed by an in-flight fire in the passenger compartment that lasted until after the aircraft broke apart, approximately three minutes after the explosion. Rec. at 226. The aircraft descended approximately 15,000 feet before it broke apart. *Id.*

This action was commenced on October 28, 1992 — more than six and one-half years after the accident at issue and nearly six years after petitioners were first told that Mexico was a more convenient forum than Texas for their claims. This is in fact the eighth action filed on behalf of some or all of the petitioners in a U.S. court. As described in more detail below, petitioners' seven previous actions against one or more of the defendants were dismissed (a) voluntarily by plaintiffs; (b) on the ground of *forum non conveniens*; or (c) for failure to prosecute. United States District Courts for

the Western District of Texas, the Northern District of Illinois and the Eastern District of Texas, as well as the Superior Court for King County, Washington, have concluded that Mexico is the appropriate forum for petitioners' claims. The Fifth Circuit Court of Appeals has affirmed dismissals of petitioners' claims in favor of the courts of Mexico on three occasions. This Court declined in 1988 to review the dismissal of petitioners' claims following the first dismissal.[1]

I. THE PRECEDING ACTION (*DE AGUILAR I*)

To place this action in its proper context, it is essential to review briefly the facts of petitioners' seventh filing, the dismissal of which was affirmed in *de Aguilar v. Boeing Co.*, 11 F.3d 55 (5th Cir. 1993) ("*de Aguilar I*"). In *de Aguilar I*, 80 named plaintiffs (20 of whom were minors) and 100 unnamed, or "Doe," plaintiffs brought claims on behalf of the same 69 decedents named in this action. Rec. at 917-23. In their Original Petition in *de Aguilar I*, plaintiffs alleged that they were bringing the action "as personal representatives of the estates of each decedent named below, in their own individual capacities and as next friends of named minor children and as heirs of each decedent named below." Rec. at 372. In accordance with Rule 47 of the Texas Rules of Civil Procedure, plaintiffs did not plead for a specific amount of damages, but prayed "for a sum in excess of the minimal [sic] jurisdictional limits of the Court." Rec. at 385.

Defendants removed the action to the United States District Court for the Eastern District of Texas. Following removal, plaintiffs filed two affidavits of their Houston attorney, Dennis C. Reich, purporting to limit the damages sought. Plaintiffs then moved to remand on the ground that

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[1] *Rodriguez Diaz v. Mexicana de Avion, S.A.*, 488 U.S. 826 (1988) (*cert. denied*).

the amount in controversy was less than $50,000. On April 2, 1992, the district court denied plaintiffs' motion to remand, holding, in part, that Mr. Reich's post-removal affidavits were irrelevant to the amount in controversy because "jurisdiction attaches at the time of removal, and subsequent events do not oust the court of jurisdiction." *de Aguilar v. Boeing Co.*, 790 F. Supp. 693, 694 (E.D. Tex. 1992). The district court also held that even if Mr. Reich's affidavits were relevant to the jurisdictional inquiry, they were insufficient to limit the amount in controversy because "the complaint names one hundred unknown plaintiffs who are not bound by the affidavit of plaintiffs' counsel" and because "plaintiff's counsel cannot compromise or agree to judgment on behalf of any minor beneficiaries of wrongful death suits without leave of court."[2] *Id.* at 695.

After denying plaintiffs' motion to remand, the district court dismissed plaintiffs' claims on the ground that the Eastern District of Texas was not a convenient forum for such claims. *de Aguilar v. Boeing Co.*, 806 F. Supp. 139 (E.D. Tex. 1992), *aff'd*, 11 F.3d 55 (5th Cir. 1993). Plaintiffs appealed the dismissal to the Fifth Circuit Court of Appeals, which affirmed both the district court's denial of plaintiffs' remand motion and the dismissal of plaintiffs' claims for refiling in the courts of Mexico. *de Aguilar I*, 11 F.3d 55 (5th Cir. 1993).

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[2]Neither the district court nor defendants were aware in April of 1992 that none of the plaintiffs had been appointed as personal representatives of the decedents' estates, and that plaintiffs' allegations on this point were false. *See infra* at 6.

II. COURSE OF PROCEEDINGS IN THIS ACTION (*DE AGUILAR II*)

A. The Original Petition and Affidavit of Counsel

Shortly after the district court dismissed *de Aguilar I*, petitioners' U.S. attorneys filed this action in the 60th Judicial District Court, Jefferson County, Texas. Original Petition, Pet. App. D at A78-105. In their latest Petition, petitioners' attorneys (1) dropped 42 of the heirs (including all 20 minors) who were named in *de Aguilar I*; (2) dropped all mention of the unnamed "Doe" plaintiffs; (3) dropped the wrongful death claims asserted in *de Aguilar I*; (4) alleged that "Plaintiffs are representatives of the estates of the decedents and bring this action pursuant to Section 71.021 of the Texas Civil Practices and Remedies Code, commonly known as the Survival Statute"; and (5) included a prayer for a specific amount of damages in violation of Rule 47 of the Texas Rules of Civil Procedure. *Id.*

In addition, petitioners attached to the Original Petition an affidavit signed by Dennis C. Reich, one of petitioners' Texas attorneys. In his affidavit, Mr. Reich stated, among other things, that "[p]laintiffs hereby irrevocably agrees [sic] to the entry of an order of court which places an irrevocable cap upon the amount of damages which may be sought by or awarded to Plaintiffs in this case" and that "[t]his cap should be set as fifty thousand dollars ($50,000.00) exclusive of interest and court costs." *Id.* at A106-08.

B. Boeing's Effort to Clarify the Amount in Controversy

Boeing was served with the Original Petition in this matter on November 12, 1992. To determine whether Mr. Reich's statements constituted a binding and irrevocable limitation on the estates' damages, counsel for Boeing, Howard L. Close, tendered a new affidavit to Mr. Reich on November 25, 1992.

Boeing asked Mr. Reich to attest, among other things, that the 38 plaintiffs named in the complaint had been appointed as the personal representatives of the decedents' estates and that these plaintiffs had expressly authorized Mr. Reich to make a binding and irrevocable admission on their behalf. *See* Notice of Removal and accompanying Affidavit of Howard L. Close, Boeing App. B.

As set forth in the Notice of Removal and the accompanying Affidavit of Howard L. Close, Boeing App. B, and subsequently described in the court of appeals' decision, plaintiffs' attorneys "refused to say that the plaintiffs had been appointed by a qualified court as the personal representatives of the estates" and "essentially . . . abandoned their claim as personal representatives." *de Aguilar v. Boeing Co.*, 47 F.3d 1404, 1406, 1414-15 (5th Cir. 1995) ("*de Aguilar II*"). In argument before the court of appeals, plaintiffs claimed "that the reason they refused to acknowledge that they had been appointed the personal representatives of the estates was that *they were suing as heirs not representatives*." *Id.* at 1406 (emphasis added).

Having determined that the 38 plaintiffs named in the Petition were merely some of the individual heirs of the 69 decedents, and that they did not have the authority to limit damages sought on behalf of those decedents' estates, defendants timely removed the action to the United States District Court for the Eastern District of Texas, where it was assigned to The Honorable Richard A. Schell. In their Notice of Removal, defendants demonstrated that plaintiffs' purported limitation on the amount of the claims of the decedents' estates was meaningless, and that without an effective limitation the amount in controversy exceeded $50,000 per decedent. *Id.*

C. Ms. Bistrain's Post-Removal Affidavit

Realizing that they had failed effectively to limit the amount in controversy prior to removal, petitioners' U.S.

attorneys filed on May 6, 1993 — nearly three months after defendants removed petitioners' claims to federal court — a Supplemental Motion to Remand and attached a one-page affidavit signed by Ms. Guadalupe Bistrain, one of petitioners' Mexican attorneys. Pet. App. F at A122-23. In her affidavit, Ms. Bistrain swore that she had received "explicit authority from each of the plaintiffs . . . to limit their damages" and that "plaintiffs . . . are authorized to sue in their capacity as an heir . . . and/or personal representative." *Id.*

Ms. Bistrain's affidavit said nothing as to when the plaintiffs purportedly communicated the authority to limit "their damages." She also did not indicate the basis for her opinion on capacity to sue and did not (and could not) state that any of the plaintiffs had the authority to agree to a limitation on the damages sought on behalf of the decedents' estates.

D. The Order Denying Plaintiffs' Remand Motion

Judge Schell denied plaintiffs' motion to remand on June 8, 1993. The primary basis for Judge Schell's ruling was that "Plaintiffs have not shown they have the authority to limit the damages sought to be recovered by the estates in this lawsuit." Memorandum Opinion and Orders Denying Motions to Remand and Motion to Strike Third Party Complaint or Alternatively Sever Third Party Action ("Mem. Op."), Pet. App. A at A26. Because he determined that plaintiffs failed to demonstrate that their purported limitation on the estates' damages was binding and effective, Judge Schell ruled that "the amount in controversy exceeded $50,000 at the time of removal." *Id.*

Shortly thereafter, Judge Schell granted a motion by defendants to dismiss plaintiffs' action pursuant to the doctrine of *forum non conveniens*.

E. The Court of Appeals' Affirmance

Petitioners appealed the dismissal to the Fifth Circuit Court of Appeals, which, in an opinion issued on March 7, 1995, affirmed both the district court's denial of petitioners' motion for remand and the dismissal on the ground of *forum non conveniens*. *de Aguilar II*, 47 F.3d at 1406.

The court of appeals held that defendants had "easily" shown by a preponderance of the evidence that the actual amount in controversy exceeded $50,000. 47 F.3d at 1412. The court went on to observe that "[t]he face of plaintiffs' pleading will not control if made in bad faith" and that "[p]laintiffs acknowledged . . . that their filing violated rule 47(b) [of the Texas Rules of Civil Procedure]." *Id.* at 1410, 1412. Rejecting plaintiffs' attempted manipulation of the pleadings, the court of appeals ruled that the prayer for damages in the Original Petition did not limit the amount in controversy. *Id.* at 1412-13.

Turning to the affidavits submitted by plaintiffs' attorneys, the court ruled that plaintiffs could not effectively limit the amount in controversy unless they had the authority to bind the estates. *Id.* at 1413. The court considered plaintiffs' argument that their authority to limit the estates' claims should be determined under Mexican law. After examining the respective interests of Texas and Mexico in the application of their law to the issue of plaintiffs' authority, the court concluded that Texas law applied. *Id.* at 1414.

The court observed that plaintiffs had essentially abandoned their claims as personal representatives and instead purported to be the decedents' legal heirs. *Id.* at 1414-15. The court ruled that plaintiffs had not alleged any of the elements necessary under Texas law to establish their authority to compromise the claims of the decedents' estates. *Id.* at 1415. In addition, the court noted that defendants had offered evidence — and plaintiffs' attorney had acknowledged at oral argument

— that plaintiffs were not the sole heirs and, therefore, lacked authority to limit the estates' claims. *Id.* Accordingly, the court of appeals concluded:

> Plaintiffs plainly have failed to meet the requirements of Texas law to limit the damages recoverable to the estates in this case. As a result, plaintiffs have failed to defeat removal jurisdiction.

Id.

III. PETITIONERS' OTHER ACTIONS IN THE UNITED STATES AND MEXICO

As discussed above, petitioners had filed six other actions in the United States against some of the defendants when they filed *de Aguilar I*.[3] The previous actions confirm that many of these 69 decedents' heirs are not parties to this action. In both *Estavillo* and *Wolf*, as well as *de Aguilar I*, all of which involve the same 69 decedents named herein, 80 persons, rather than the 38 named in this action, were specifically named in the complaints as heirs. Furthermore, the plaintiffs in *Wolf* specified that the listing of 80 heirs for these 69 decedents was "a partial listing" and that "[a]dditional survivors will be named." Rec. at 343-46.

In addition to eight actions filed in U.S. courts, claims arising from the Mexicana accident are presently pending against Mexicana in Civil District Court in Mexico. Rec. at 227, 403-21. The plaintiffs in that action, several of whom are

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[3]The *Rodriguez*, *Penasco (Texas)*, *Penasco (Illinois)*, *Penasco (California)*, *Estavillo* and *Wolf* actions are summarized at pages 183-85 of the Record on Appeal.

also plaintiffs in this action, described the claims of the decedents' estates as follows:

> [T]he persons who died in this crash underwent minutes of terrible suffering when the damage began and the plane caught fire. They realized that the airliner would inevitably crash. . . . Your Honor may take as a basis *the amount of $75,000 or more*, or its equivalent in pesos, by way of reparation for pain and suffering caused to the victims of the crash.

Rec. at 414 (emphasis added).

REASONS FOR DENYING THE WRIT

Boeing respectfully requests that this Court deny the Petition for a Writ of Certiorari to review the court of appeals' decision in this case because:

(1) The court of appeals did not depart from the accepted and usual course of judicial proceedings by holding that plaintiffs who desire to sue for less, and thereby avoid trying their case in federal court, must do so in good faith and not merely manipulate the pleadings to create the illusion that the amount in controversy is less; and

(2) The decision of the court of appeals that plaintiffs did not effectively sue for less does not conflict with the decision of another court of appeals on the same matter.

I. THE COURT OF APPEALS DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY HOLDING THAT PLAINTIFFS WHO DESIRE TO SUE FOR LESS, AND THEREBY AVOID TRYING THEIR CASE IN FEDERAL COURT, MUST DO SO IN GOOD FAITH AND NOT MERELY MANIPULATE THE PLEADINGS TO CREATE THE ILLUSION THE AMOUNT IN CONTROVERSY IS LESS

The principle enunciated by this Court in *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938), that if a plaintiff "does not desire to try his case in federal court he may resort to the expedient of suing for less than the jurisdictional amount" is not at issue in this case. The Fifth Circuit Court of Appeals did not, as petitioners contend, disregard this principle. Rather, the court of appeals correctly determined on the facts of this case that petitioners had not in good faith sued for less, but had engaged in "manipulation" of the pleadings.

A. The Court of Appeals Correctly Determined That, Absent an Effective Limitation on the Estates' Damages, the Amount in Controversy Was in Excess of $50,000 Per Decedent

In support of their removal of this action, defendants first demonstrated to the district court that absent an effective limitation on the estates' damages the amount in controversy was in excess of $50,000 per decedent.[4] Defendants presented evidence that if the decedents' estates were entitled to recover

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[4] Since the Texas Survival Statute creates a single right of action for the damages sustained by the decedent, the claims of all the persons entitled to share in the proceeds of each decedent's estate must be aggregated to determine the amount in controversy. *See Shields v. Thomas*, 58 U.S. 3 (1855); *Insurance Co. of N. Am. v. Chinowith*, 393 F.2d 916 (5th Cir.), *cert. denied*, 393 U.S. 990 (1968).

under Texas law, as plaintiffs alleged, and if plaintiffs could prove by credible evidence that the "decedents, during the flight of the subject aircraft leading up to the crash, suffered mental anguish due to fear of death, mental anguish and pain and suffering," as plaintiffs also alleged, then the probable recovery by the estates was in excess of $50,000 per decedent. *See* Rec. at 181-82, 216-435, 436-40.

At no time in the district court or in the court of appeals have petitioners challenged defendants' showing on this issue. Thus, all the evidence supports a finding that the injuries alleged in the Original Petition, if proven, would support a probable verdict in excess of $50,000 per decedent. This evidence led the court of appeals to conclude that "it is facially apparent that the damages rise to a level above $50,000." *de Aguilar II*, 47 F.3d at 1412. In view of petitioners' failure to identify any contrary evidence, this conclusion undoubtedly was correct.

B. The Court of Appeals Correctly Determined That the Prayer for Damages Relied on by Petitioners Was Improper and Meaningless

The state complaint in this case was filed in Texas, which has the following rule:

> An original pleading . . . shall contain . . . (b) in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limit of the court.

Tex. R. Civ. P. 47(b). Since plaintiffs' claims were for unliquidated damages, the only statement concerning the amount of damages permitted by the Texas Rules of Civil Procedure was that the damages sought exceed the minimum jurisdictional limits of the state court. *See Capitol Brick, Inc. v. Fleming Mfg. Co.*, 722 S.W.2d 399, 401 (Tex. 1986) ("Rule 47 precludes a party, except by response to a special

exception, from pleading unliquidated damages in a specific amount."). The statements in the Original Petition purporting to limit the amount of damages claimed clearly violated Texas pleading requirements. Indeed, "[p]laintiffs acknowledged during oral argument [before the court of appeals] that their filing violated rule 47(b)." *de Aguilar II*, 47 F.3d at 1412. Thus, the prayer for damages could not effectively limit the amount in controversy. As the court of appeals stated:

> A plaintiff, in a case for unliquidated damages, cannot, absent a further showing, avoid removal by pleading for damages under the jurisdictional amount where a state rule prevents such pleading and where defendants are able to show that it is facially apparent that the amount in controversy exceeds $50,000.

Id.

C. The Court of Appeals Correctly Determined That Petitioners Lacked the Authority to Limit the Estates' Claims

1. Petitioners' Assertion That *Saint Paul Mercury* Barred Any Inquiry Into Petitioners' Authority to Limit the Estates' Claims Is Groundless

Petitioners contend that the court of appeals should not have considered whether plaintiffs were authorized to limit the estates' claims. Petitioners characterize the court's consideration of this issue as a collateral attack on the pleadings and assert that this Court's decision in *Saint Paul Mercury* prohibited such an attack. Petition at 40-41.

In *Saint Paul Mercury*, the plaintiff's state court complaint sought damages in excess of the jurisdictional amount. It was only after removal that the plaintiff amended his complaint to

seek less than the jurisdictional amount. This Court held that the post-removal amendment did not change the amount in controversy at the time of removal and, therefore, did not divest the federal court of jurisdiction. This Court observed that if a plaintiff does not desire to try his case in federal court "he may resort to the expedient of suing for less than the jurisdictional amount." 303 U.S. at 294.

The issue in the present case was whether plaintiffs had in fact sued for less, which issue *Saint Paul Mercury* did not address. Nothing this Court said in *Saint Paul Mercury* supports petitioners' contention that once a plea for less than the jurisdictional amount is made, the federal courts are powerless to inquire into whether that plea was made in good faith, and effectively limits the amount sued for.

Petitioners' characterization of the decision below as a collateral attack on their pleadings is likewise frivolous. Defendants had the burden of proving the existence of federal jurisdiction. As discussed above, defendants met that burden by showing, by a preponderance of the evidence, that it was more likely than not that each decedent's claim met the jurisdictional minimum. It was plaintiffs, not defendants, who had the burden of proving that they had the authority to limit the estates' damages. This conclusion follows from the general principle that proof of a matter of avoidance is the burden of the party asserting it irrespective of who has the burden on the underlying issue. *See, e.g., Kabealo v. Huntington Nat'l Bank*, 17 F.3d 822 (6th Cir.), *cert. denied*, 115 S. Ct. 64 (U.S. 1994); *Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230, 233 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974) ("Since the above rules are in avoidance of the statute of limitations, the party seeking the benefit of them has the burden of proof to establish them."). Although a removing defendant must show facts establishing federal jurisdiction, it does not bear the burden of proving the absence of waiver, which rests with the party seeking to establish waiver.

An analogous case is *City of New York v. Pullman Inc.*, 477 F. Supp. 438 (S.D.N.Y. 1979), in which the defendant removed under 28 U.S.C. §§ 1441 and 1332, showing the existence of diversity of citizenship and the requisite amount in controversy. The plaintiff moved to remand, asserting that the parties had, by agreement, waived their right to proceed in federal court. The court placed the burden of proof regarding that issue on the plaintiff, stating:

> The normal construction of the jurisdiction rules includes a presumption that, where jurisdiction exists, it cannot be ousted or waived absent a clear indication of such a purpose . . . .

Id. at 443. Thus, once defendants established that the amount in controversy exceeded $50,000, plaintiffs were required to provide "clear" evidence that federal court jurisdiction had been "ousted."

2. Petitioners Have Not Argued That Under Texas Law They Had The Authority To Limit The Estates' Claims

The personal representative is the ordinary person to prosecute claims on behalf of an estate under Texas law. *See* Tex. Prob. Code § 233A; *Chandler v. Welborn*, 156 Tex. 312, 294 S.W.2d 801 (1956). Plaintiffs recognized this basic principle in their Original Petition by alleging that they were personal representatives. Original Petition, Pet. App. D at A86-87. However, that allegation turned out to be false.[5]

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[5] Petitioners' description of their status to this Court is less than forthright. Under the heading "Questions Presented," petitioners describe themselves as "representatives of estates of decedents." Petition at i. Under the heading "Statement of the Case and Procedural History," petitioners describe plaintiffs in *de Aguilar I* as "[r]elatives

Thus, the reality was that plaintiffs commenced the action as individual heirs of the decedents — a procedure permitted by Texas law. Tex. Civ. Prac. & Rem. Code § 71.021; *Handley v. City of Seagoville*, 798 F. Supp. 1267 (N.D. Tex. 1992).

Because plaintiffs were really proceeding in their individual capacities, Texas law required them to demonstrate that they were the *sole heirs* of the decedents in order to compromise the estates' claims or take them to judgment. *Martinez v. Angerstein*, 517 S.W.2d 811, 816 (Tex. Civ. App. 1974); *Sustaita v. Valle*, 38 S.W.2d 638 (Tex. Civ. App. 1931). However, plaintiffs made no effort to prove that they were the sole heirs. In fact, it was clear from plaintiffs' own pleadings in the earlier cases that plaintiffs were not the sole heirs or the sole beneficial owners of the estates' survival claims and plaintiffs' attorney acknowledged as much at oral argument. 47 F.3d at 1415. Thus, the court of appeals correctly determined that "[p]laintiffs' plainly have failed to meet the requirements of Texas law to limit the damages recoverable to the estates in this case."[6] 47 F.3d at 1415.

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and personal representatives of the estates." Petition at 4. However, later in the same section, when describing plaintiffs in this action, *de Aguilar II*, petitioners avoid any reference to their status as heirs or personal representatives. Petition at 9-10. Finally, in the portion of the Petition addressing the court of appeals' determination that plaintiffs lacked the authority to limit the estates' claims, petitioners refer to themselves as "heirs." Petition at 39. At no point in the argument do petitioners claim to be personal representatives of the decedents' estates. Nor do they take issue with the court of appeals' determination that they essentially abandoned their claim as personal representatives. *de Aguilar* II, 47 F.3d at 1414-15.

[6] Furthermore, even if plaintiffs had been appointed personal representatives of the decedents' estates, any attempt to limit the estates' damages without prior court approval would have been "unauthorized." *Catlett v. Catlett*, 630 S.W.2d 478, 483 (Tex. Ct. App. 1982).

3. Petitioners' Procedural Argument That Defendants Could Not Challenge Their Authority to Limit The Estates' Claims Is Frivolous

Petitioners contend that if Texas law governed their authority to limit the estates' claims, defendants were required to follow Texas state court procedure by filing a plea in abatement or verified denial in order to make a federal court challenge to plaintiffs' authority. *See* Petition at 40 n.10. This procedural argument is both off the mark and frivolous.

The issue before the district court was simply whether defendants were required to comply with Rule 93(1) of the Texas Rules of Civil Procedure when they challenged plaintiffs' authority to limit the estates' damages in federal court. Rules 11 and 12 of the Federal Rules of Civil Procedure do not require a plea in abatement or a verified denial. Plaintiffs did not and could not assert that the pleading requirements spelled out in the Federal Rules of Civil Procedure are unconstitutional or in violation of the language of the Rules Enabling Act, 28 U.S.C. § 2072. *See Sneed Shipbuilding, Inc. v. Spanier Marine Corp.*, 125 F.R.D. 438, 441 (E.D. Tex. 1989); Mem. Op., Pet. App. A at A16. Thus, the courts below correctly determined that the Federal Rules of Civil Procedure provided the proper procedure for defendants to challenge plaintiffs' capacity to limit the estates' claims. It is undisputed that defendants complied with federal procedures.[7]

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[7] While *Hanna v. Plumer*, 380 U.S. 460 (1965), and its progeny provide the obvious rebuttal to plaintiffs' argument, and the one relied on by the courts below, it is not the only rebuttal. As defendants pointed out to the courts below, there is a distinction under Texas law between the capacity of individual heirs to commence an action (*e.g.*, to toll a limitations period) and their authority to compromise the estate's claim or to take it to judgment. Rec. at 199-203. At issue in this case was only

4. Petitioners' Contention That Their Authority To Limit The Estates' Claims Should Have Been Determined Under Mexican Law Is Without Merit

Petitioners also attack the court of appeals' determination that petitioners' authority to limit the claims of the decedents' estates under the Texas Survival Statute was governed by Texas law. Petition at 41-43. Again, petitioners' argument is frivolous.

The court of appeals explained its decision to apply Texas law as follows:

> Mexico has no underlying interest in the application of its law to determine who can bring a cause of action or bind the estate in a Texas cause of action. Texas certainly has an interest in requiring those who seek to take advantage of Texas law to meet certain requirements. In addition, uniformity and predictability in Texas courts would be promoted when deciding who has the authority to pursue actions on behalf of estates. This is a false conflict, and Texas law applies. *See Duncan* [*v. Cessna Aircraft Co.*], 665 S.W.2d [414, 422 (Tex. 1984)]. In this situation, we have no doubt that a Texas court would choose to apply Texas law.

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the latter concept. Under Texas law, a failure to join the personal representative or all the heirs can be raised by a party at any time or by the court on its own motion even if not raised by a party. *Phillips v. Teinert*, 493 S.W.2d 584, 585-86 (Tex. Civ. App. 1973). Thus, even if the district court had concluded that Rule 93(1) of the Texas Rules of Civil Procedure applied, defendants would have been entitled to raise the issue of plaintiffs' lack of authority to bind the estates.

47 F.3d at 1414. Petitioners' reliance on *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir. 1987), *vacated on other grounds, remanded, Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032, *later proceeding, In re Air Crash Disaster Near New Orleans*, 883 F.2d 17 (5th Cir. 1989), is entirely misplaced. Texas choice of law rules require application of "'the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties.'" *de Aguilar II*, 47 F.3d at 1413 (quoting *Restatement (Second) of Conflict of Laws* § 145 (1971)). The fact that Uruguay was found to have the most significant relationship to the damages issue in *In re Air Crash Disaster Near New Orleans* has no bearing on the issue before the court of appeals in this case, namely whether Texas or Mexico had a greater interest in requiring those who take advantage of Texas law to meet certain requirements.

Petitioners also assert that "previous courts in this case have held that Mexican law applies." Petition at 43. Petitioners fail to identify what rulings they are referring to. Presumably their argument is based on one or more of the decisions granting *forum non conveniens* dismissal in which the courts found that the likelihood that the laws of Mexico would apply on some of the substantive law issues in the case, such as the measure of damages, was a factor favoring *forum non conveniens* dismissal. If this is what petitioners are referring to, their argument is plainly wrong. No court in addressing the issue of *forum non conveniens* has ruled on the law to be applied in determining whether plaintiffs have the authority to limit the claims of the decedents' estates.

Even if the law of Mexico were applied, petitioners have failed here — as they did in the courts below — to provide *any* proof that Mexican law differed in any way from Texas law on the issue of an individual heir's capacity to limit damages on behalf of a decedent's estate. When plaintiffs finally did decide — nearly two months after defendants removed

this case — that it might be in their interest to seek the application of Mexican law, the only showing they made as to the content of Mexican law was the following statement in a brief signed by Texas lawyers.

> Pursuant to Mexican law, a law which Defendants have alleged applies to the case, if an administrator has been appointed, heirs must enforce their rights through an administrator, ***but*** if an administrator has not been appointed, the heirs may make their claims directly. Civil Code of Federal District 1281-1294, 1599-1791.

Rec. at 476.

Even if this statement could have been considered evidence of Mexican law, plaintiffs intentionally or unintentionally confused the questions of (a) an individual heir's standing to bring an action on behalf of an estate and (b) an individual heir's authority to compromise the claim or bring the action to judgment.[8] Defendants never challenged plaintiffs' standing to bring this action. Defendants did, however, challenge plaintiffs' authority to limit the estates' damages. Plaintiffs did not present *any* evidence that Mexican law, unlike Texas law, gave them that authority.

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[8] The affidavit that Ms. Guadalupe Bistrain signed and plaintiffs submitted to the trial court three months after removal had the same inherent flaw. The affidavit asserted only that "[e]ach of the named plaintiffs identified in the above-captioned lawsuit are authorized to *sue* in their capacity as an heir at law and/or personal representative for each of the respective decedents identified in Plaintiffs Original Petition filed under the style and cause number referenced above." Pet. App. F at A123 (emphasis added).

Moreover, petitioners completely ignore the fact that the district court reviewed the Mexican statutes that petitioners cited and determined that one of those statutes — Article 1289 — "may prevent Plaintiffs from binding an estate to a compromise without including all other persons who have an interest in the estate." Mem. Op., Pet. App. A at A25. Thus, all the evidence before the courts below supported a finding that plaintiffs lacked authority to make a binding damages limitation under Mexican law as well as Texas law.

II. THE DECISION OF THE COURT OF APPEALS THAT PLAINTIFFS DID NOT EFFECTIVELY SUE FOR LESS THAN THE JURISDICTIONAL AMOUNT DOES NOT CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER

Petitioners identify three appellate court decisions that they contend conflict with *de Aguilar II* on the same matter: *Laughlin v. Kmart Corp.*, 50 F.3d 871 (10th Cir. 1995); *Gaus v. Miles, Inc.*, 980 F.2d 564 (9th Cir. 1992); and *Burns v. Windsor Ins. Co.*, 31 F.3d 1092 (11th Cir. 1994). None of those decisions, however, addressed the same issue presented in *de Aguilar II*. Rather, in all these cases there was no evidence that the damages suffered by plaintiffs exceeded the federal jurisdictional minimum of $50,000, and there was no effort by any of those plaintiffs somehow to limit to $50,000 a claim that would otherwise far exceed the jurisdictional minimum. In this case, by contrast, the court of appeals found it to be "facially apparent that the damages rise to a level above $50,000," 47 F.3d at 1412, and the only real issue was the efficacy and good faith of purported limits on the claims to recover those damages.

In *Laughlin*, the plaintiff-appellant commenced an action in state court alleging damages for each of two claims "in excess of $10,000." 50 F.3d at 873. Kmart subsequently filed a notice of removal, but the notice did not refer to an amount in

controversy and failed to include any of the facts establishing the requisite jurisdictional amount. *Id.*

When the case reached the court of appeals following a dispositive motion, the court of appeals held that subject matter jurisdiction was lacking. The court based its decision on the fact that "[n]either Laughlin's petition nor Kmart's notice of removal establish[ed] the requisite jurisdictional amount." *Id.* The court quoted *Gaus*, 980 F.2d at 567, for the proposition that "the burden is on the party requesting removal to set forth, in the notice of removal itself, the '*underlying facts* supporting [the] assertion that the amount in controversy exceeds $50,000.'" 50 F.3d at 873. This was not done and the court of appeals held that defendant's effort to supplement the record on appeal would not be allowed.

This case, in contrast to *Laughlin*, does not involve a failure to refer, in the notice of removal, to the amount in controversy or a failure to set forth the underlying facts establishing that the amount in controversy exceeds $50,000. The Notice of Removal filed by Boeing and the other defendants explicitly stated that "each claim on behalf of a decedent's estate involves an amount in controversy in excess of $50,000, exclusive of interest and costs." Notice of Removal, Boeing App. B. Furthermore, the Notice of Removal set forth in detail the facts supporting such statement with reference to a supporting affidavit attached as Exhibit A to the Notice of Removal.[9] *Id.* As the court of appeals stated in describing the removal of this case:

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[9] Petitioners' appendices omit the signature blocks for defendants-respondents Delta Airlines, Inc. and Parker Hannifin Corporation, as well as all the exhibits to the Notice of Removal, Pet. App. D. The omitted exhibits include the Affidavit of Howard L. Close In Support of Defendants' Notice of Removal and Attachments 1 and 2 thereto, which set forth facts establishing the amount in controversy. The complete

> [D]efendants . . . removed . . ., establishing in their notice of removal that the amount in controversy exceeded $50,000.

47 F.3d at 1407.[10]

With respect to the Ninth Circuit Court of Appeals' decision in *Gaus*, petitioners state:

> [T]he court in *Gaus* indicated . . . that, if the plaintiff had expressly sought less than the jurisdictional minimum, the plaintiff would have been entitled to remand.

Petition at 47. In fact, no such ruling — whether express, implied or in dicta — can be found in the *Gaus* decision.

In *Gaus*, the plaintiff-appellant filed suit in state court alleging damages "in excess of $10,000." 980 F.2d at 565. The defendant removed the case to federal court alleging in the notice of removal that "the matter in current controversy . . . exceeds the sum of $50,000." *Id.* The court of appeals ruled that the defendant bears the burden of proving the facts to support jurisdiction, including the jurisdictional amount, by a preponderance of the evidence where it is unclear from the

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Notice of Removal and Exhibit A thereto is appended hereto as Boeing App. B.

[10] Kmart has filed a petition for a writ of certiorari in *Laughlin*, in which Kmart cites *de Aguilar II* for the proposition that "where the amount of damages a plaintiff seeks is unclear, the appellate court is to look to the entire record and make an independent evaluation as to whether the jurisdictional amount is met." Kmart Petition at 10. This characterization of *de Aguilar II* fails to acknowledge the fundamental difference between the Notice of Removal filed in *de Aguilar II* and the notice of removal filed in *Laughlin*.

complaint what amount of damages the plaintiff has sought. *Id.* at 566-67.[11]

Because the defendant-appellee "offered no facts whatsoever to support the court's exercise of jurisdiction," the court of appeals returned the case to the district court with instructions to remand.

The decision in *Gaus* is entirely in accord with the Fifth Circuit decisions in *de Aguilar I* and that portion of *de Aguilar II* describing the principles on which the decision in *de Aguilar I* was based. However, the *Gaus* court never reached the question presented in *de Aguilar II*, namely what happens when a plaintiff files a pleading or other paper purporting to limit the claim to less than the actual damages and less than the jurisdictional minimum. Petitioners' contention that *Gaus* addressed this issue (and resolved it in a manner that conflicts with *de Aguilar II)* is simply incorrect.

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[11] The Fifth Circuit articulated the same rule in *de Aguilar I* and recited it with approval in *de Aguilar II*:

> In *de Aguilar I*, we stated that "[w]hen the plaintiff's complaint does not allege a specific amount of damages, the *removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds $50,000.*" 11 F.3d at 58 (citing *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir. 1992); *Garza [v. Bettcher Indus., Inc.]*, 752 F. Supp. [753, 763 (E.D. Mich. 1990)]). *See also Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1094 (11th Cir. 1994) (noting that in the "typical" removal case "defendant can remove to federal court if he can show, by a preponderance of the evidence, facts supporting jurisdiction").

47 F.3d at 1409 (emphasis added).

Finally, the issue presented in *Burns* was also substantially different from the issue faced by the court in *de Aguilar II*. In *Burns*, the plaintiff filed a complaint in Alabama state court seeking damages "in such sum as the jury determines to be just, lawful, and fair, but not more than $45,000 plus costs." 31 F.2d at 1094. The defendant removed the case on the basis that the prayer for relief did not cap the plaintiff's recoverable damages and that the plaintiff could at a later date seek to recover more than $50,000. The district court declined to remand and subsequently dismissed the case on a dispositive motion.

The Eleventh Circuit Court of Appeals began its analysis by observing that there was no jurisdiction on the face of the plaintiff's claim because the complaint specifically requested no more than $45,000 in damages. *Id.* at 1095. The court held that, considering the specific nature of the plaintiff's damages claim, to avoid a remand "defendant must prove to a legal certainty that plaintiff's claim must exceed $50,000." *Id.* The court concluded that this burden had not been met: the defendant offered "nothing more than conclusory allegations that predict that plaintiff intends to wait a year from her filing date and then boost her damage request." More significantly, the court noted that defendant offered "no proof that plaintiff's prayer [was] grossly inconsistent with her alleged damages." *Id.* at 1097.

Petitioners correctly point out that *Burns* imposed a higher burden of proof on the defendant seeking to remove than the preponderance of the evidence test adopted in *de Aguilar II*. What petitioners fail to recognize, however, is that the issue before the court in *Burns* was substantially different than the issue in *de Aguilar II*.

First, in *Burns*, it was not apparent from the record that the damages alleged necessarily exceeded $50,000. 31 F.3d at 1097 ("no proof that plaintiff's prayer [for $45,000] is grossly

inconsistent with her alleged damages"). Rather, the defendant relied exclusively on the argument that the plaintiff was not bound by her plea and might in the future increase her claim; however, defendant never established that the actual damages suffered would even support a larger claim, much less that plaintiff was "manipulating" the pleadings to avoid federal court. In *de Aguilar II* the defendants produced evidence that the amount in controversy at the time of removal far exceeded $50,000. 47 F.3d at 1412. Moreover, the court of appeals in *de Aguilar II* expressly endorsed the ruling in *Burns* that the mere possibility that the plaintiff may in the future seek to recover more damages is insufficient to support federal jurisdiction. *Id.* at 1409.

Second, the plaintiff's plea for a specific amount of damages in *Burns* did not violate any rule governing pleadings submitted in Alabama state court. *See, e.g., Pepsi Cola Bottling Co. v. Allen*, 572 So. 2d 434 (Ala. 1990). Thus, the court in *Burns* could conclude that "plaintiff's claim, when it is specific and in a pleading signed by a lawyer, deserves deference and a presumption of truth." 31 F.3d at 1095.[12] Plaintiffs' plea in *de Aguilar II*, in contrast, was submitted in direct violation of Rule 47 of the Texas Rules of Civil Procedure. Based on the finding that plaintiffs had manipulated their pleadings in bad faith, the court of appeals was justified in declining to give plaintiffs' plea the same deference accorded the plea in *Burns*.

CONCLUSION

Petitioners submitted their complaint in violation of the applicable pleading requirements and falsely claimed to be personal representatives of the decedents' estates in an effort

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[12] In *Burns*, there was no question that the plaintiff had the authority to limit the amount of damages she claimed.

to create the illusion that they were suing for less than the jurisdictional amount. The court of appeals did not depart from the accepted and usual course of judicial proceedings by holding that petitioners had not in good faith sued for less than the jurisdictional amount. No decision of this Court or any court of appeals supports a different result on the facts of this case. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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The Boeing Company
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August 10, 1995

No. 95-102

In the

Supreme Court of the United States

October Term, 1995

ALMA TORREBLANCA DE AGUILAR, et al.,

Petitioners,

v.

THE BOEING COMPANY, et al.,

Respondents,

v.

COMPANIA MEXICANA DE AVIACION, S.A.,

Third-Party Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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APPENDICES TO BRIEF IN OPPOSITION OF RESPONDENT BOEING

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ALMA TORREBLANCA de AGUILAR, et al., Plaintiffs VS. THE BOEING COMPANY, et al., Defendants.	1:92-CV-537

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS BASED ON FORUM NON CONVENIENS

CAME ON TO BE CONSIDERED Defendant The Boeing Company's motion for summary judgment and motion to dismiss on the basis of forum non conveniens, which are joined in by all other defendants and the third-party defendant. After reviewing the motions, the lack of response in opposition, and the pleadings of record, the court is of the opinion that the Defendants' motion to dismiss should be GRANTED and, therefore, the court does not reach Defendants' motion for summary judgment.

On June 8, 1993 this court denied Plaintiffs' motion to remand this case to Texas state court. On July 8, 1993 Boeing filed a motion for summary judgment based on limitations and in the alternative a motion to dismiss Plaintiffs' claims based on forum non conveniens. Shortly thereafter, all other defen-

dants, Delta Air Lines, Inc., the Goodyear Tire and Rubber Company, the B.F. Goodrich Company, Parker Hannifin Corporation, as well as the third-party defendant, Compania Mexicana de Aviacion, S.A., d/b/a Mexicana Airlines, joined in Boeing's motions.

This case has been dismissed by four other federal courts on the basis of forum non conveniens. In fact, these same plaintiffs were dismissed on that basis by Judge Howell Cobb of the Eastern District of Texas. *Torreblanca de Aguilar v. Boeing Co.*, 806 F. Supp. 139 (E.D. Tex. 1992). Judge Cobb found that direct estoppel precluded Plaintiffs from relitigating the forum non conveniens issue. In the alternative, Judge Cobb rule the case would be dismissed on an independent determination under the doctrine of forum non conveniens. The court agrees with Judge Cobb's sound reasoning in the previous case. The court adopts that reasoning and results for this case. Because the court finds this is not a proper and convenient forum to try this case, it declines to rule on Defendants' motion for summary judgment.

IT IS, therefore, ORDERED that Defendants' Motion to Dismiss on the grounds of forum non conveniens is GRANTED, and this action is DISMISSED at Plaintiffs' cost.

SIGNED this the 11th of August, 1993.

/ S /

Richard A. Schell
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ALMA TORREBLANCA de AGUILAR, AS REPRESENTATIVE OF THE ESTATE OF DAVID ALBERTO AGUILAR CHAVEZ, DECEASED; IRENE de la LLATA VDA de ANZALDUA AS REPRESENTATIVE OF THE ESTATE OF CARMEN ANZALDUA de la LLATA, DECEASED; ING. HERNAN BARRIOS, AS REPRESENTATIVE OF THE ESTATE OF MARIA GUADALUPE de la CARIDAD BARRIOS AVILES, DECEASED; JORGE FEDERICO ALTSCHULER CASTRO, AS REPRESENTATIVE OF THE ESTATES OF PILAR MENA de ALTSCHULER, DECEASED; MIRIAM ALTSCHULER MENA, DECEASED; AND ALEJANDRO ALTSCHULER MENA, DECEASED; ROQUE BAUTISTA FAJARDO, AS REPRESENTATIVE OF THE ESTATE OF MARIA ESTELA BAUTISTA ABARCA, DECEASED; SARAI HERNANDES BAUTISTA, DECEASED; AND DALIA HERNANDES BAUTISTA, DECEASED;	CIVIL ACTION NO. 1:92CV 537

AND ANA MARIA ESPERANZA CUELLAR de BOURLON, AS REPRESENTATIVE OF THE ESTATE OF MARIA EMILIA BOURLON CUELLAR, DECEASED; ADELA CESPEDES de CORTINA, AS REPRESENTATIVE OF THE ESTATE OF MARIA del REFUGIO CORTINA CUELLAR, DECEASED; EDUARDO CALDERON, AS REPRESENTATIVE OF THE ESTATES OF EDUARDO CALDERON ZAVALA, DECEASED; GLORIA CALDERON SOTOMAYOR de BAUTISTA, DECEASED; CARLOS EDUARDO BAUTISTA CALDERON, DECEASED; AND LILIA BAUTISTA CALDERON, DECEASED; CARLOS de la TORRE DELGADILLO, AS REPRESENTATIVE OF THE ESTATE OF SYLVIA RIVERA PEREZ de la TORRE, DECEASED; JUAN de la O. GUZMAN, AS REPRESENTATIVE OF THE ESTATES OF HECTOR ARTURO de la O. MACIEL, DECEASED; YOLANDA BENITEZ de la O., DECEASED, AND HECTOR ARTUR de la O. BENITEZ, DECEASED; ESPERANZA ESTAVILLO DIAZ AND LUZ MARIA ESTAVILLO DIAZ, AS REPRESENTATIVES OF THE ESTATES OF HORACIO ESTAVILLO LAGUNA, DECEASED; MARIA de la LUZ DIAZ de ESTAVILLO, DECEASED; AND HORACIO ESTAVILLO DIAZ, DECEASED; LUIS GOMEZ DAZA RANGEL, AS REPRESENTATIVE OF THE ESTATE OF ADELA GOMEZ DAZA CORTINA, DECEASED; MARIA CONCEPCION GOMEZ HERNANDEZ,

AS REPRESENTATIVE OF THE ESTATES OF JESUS GOMEZ HERNANDEZ, DECEASED; AND TERESA HERNANDEZ de GOMEZ, DECEASED; DAVID L. JASQUI ELO AS REPRESENTATIVE OF THE ESTATES OF OF JACOBO JASQUI DEBBAH (DERBAH), DECEASED; RAQUEL NOAH de JASQUI, DECEASED; SOFIA JASQUI NOAH, DECEASED; TERESA JASQUI NOAH, DECEASED; AND DAVID JASQUI NOAH, DECEASED; JOHN EHRHARD KOHN CORNEJO, AS REPRESENTATIVE OF THE ESTATE OF CATIA (KATIA) KOHN PAZ de HERNANDEZ, DECEASED; MARIA MONICA RIVERO, la FUENTE de LUENGAS, AS REPRESENTATIVE OF THE ESTATE OF PALMIRA de la FUENTE RIVERO, DECEASED; ALEJANDRO MA GUADALUPE MERINO CASARIN, AS REPRESENTATIVE OF THE ESTATE OF OFELIA CASARIN ALCIBAR, DECEASED; JESUS ERNESTO MERINO ORTIZ, AS REPRESENTATIVE OF THE ESTATES OF MARGARITA del TORAL MERINO, DECEASED; MARGARITA MERINO del TORAL, DECEASED; CELIA MERINO del TORAL, DECEASED; AND MONICA MERINO del

TORAL, DECEASED; ING.EDEL OJEDA MALPICA, AS REPRESENTATIVE OF THE ESTATE OF LUIS ENRIQUE OJEDA SANTANA, DECEASED; GUILLERMO PIERDANT PEREZ, AS REPRESENTATIVE OF THE ESTATE OF HIGINIO PERIDANT QUIROZ, DECEASED; MARIA DOLOREZ ROSALES DIAZ, AS REPRESENTATIVE OF THE ESTATES OF JULIA DIAZ COBIAN de ROSALES, DECEASED; AND NATAEL GERARDO ROSALES FLORES, DECEASED; DAVID RODRIGUEZ DIAZ, AS REPRESENTATIVE OF THE ESTATES OF IMELDA ZALDIVAR MORENO de RODRIGUEZ, DECEASED; ANABEL RODRIGUEZ ZALDIVAR, DECEASED; MA GABRIELA RODRIGUEZ ZALDIVAR, DECEASED; JOSEFINA ROMERO de MATAGNE, AS REPRESENTATIVE OF THE ESTATE OF GENOVEVA BAUMGARTEN de BAUMGARTEN, DECEASED; MARIA TERESA SANTOS MUNOZ de CASTRO, AS REPRESENTATIVE OF THE ESTATE OF AGUSTIN CASTRO DIAZ, DECEASED; DELFINA GRACIELA TOVAR VDA de SOSA, AS REPRESENTATIVE OF THE ESTATE OF ENRIQUE ALEJANDRO SOSA ROJAS, DECEASED; LIC FERNANDO YZUNZA BRENA, AS REPRESENTATIVE OF THE

ESTATE OF FEDERICO YZUNZA BRENA, DECEASED; CAROLINA HUITRON ESPINOZA de YTUARDE, AS REPRESENTATIVE OF THE ESTATE OF AGUSTIN YTUARDE SALAZAR, DECEASED; OCTAVIO QUESNEL AND GRACIELA GALVAN de QUESNEL, AS REPRESENTATIVES OF THE ESTATE OF AMELIA FLORENICA QUESNEL GALVAN, DECEASED; MONICA COWLAND, AS REPRESENTATIVE OF THE ESTATE OF PETER MILES COWLAND, DECEASED; SOFIA LARTILLEAUX, AS REPRESENTATIVE OF THE ESTATES OF AYMERIC J. LARTILLEAUX, DECEASED; CHANTAL LARTILLEAUX, DECEASED; ELIZABETH LARTILLEAUX, DECEASED; ERIC LARTILLEUX, DECEASED; PIERRE LARTILLEUX, DECEASED; VIRGINIA LARTILLEUX, DECEASED; XAVIER LARTILLEUX, DECEASED; NATALIE LARTILLEUX, DECEASED; AND PIERRE LARTILLEUX, JR., DECEASED; PAUL RENEE PIAGET, AS REPRESENTATIVE OF THE ESTATE OF PHILIP LEWIS PIAGET RHORER, DECEASED; JAIME GUZMAN VAZQUEZ, AS REPRESENTATIVE OF THE ESTATE OF ANA ROSA GUZMAN FLORES, DECEASED; CARLOS ALBERTO GUADARRAMA, SR., AS REPRESENTATIVE OF THE ESTATE OF

CARLOS ALBERTO GUADARRAMA, DECEASED; DR. ROBERTO PINON LOZANO, AS REPRESENTATIVE OF THE ESTATE OF HAYDEE LOZANO de PINON, DECEASED; DR. ROBERTO PINON LOZANO AS REPRESENTATIVE OF THE ESTATE OF ROBERTO PINON PEREZ, DECEASED; AND JAIME CUKIER, AS REPRESENTATIVE OF THE ESTATES OF GOLD SHVEID de CUKIER, DECEASED; ABRAHAM CUKIER SHVEID, DECEASED; ILAN CUKIER SHVEID, DECEASED; AND URI CUKIER SHVEID, DECEASED

PLAINTIFFS.

VS.

THE BOEING COMPANY, THE B.F. GOODRICH COMPANY, THE GOODYEAR TIRE AND RUBBER COMPANY, DELTA AIR LINES, INC. AND PARKER HANNIFIN CORPORATION,

DEFENDANTS.

DEFENDANTS' NOTICE OF REMOVAL

TO: CLERK, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

AND TO: PLAINTIFFS ALMA TORREBLANCA DE AGUILAR, ET AL;

AND TO: DENNIS C. REICH, ATTORNEY AT LAW
4265 San Felipe, Suite 620
Houston, TX 77027, Plaintiffs' Attorney

AND TO: MITCHELL A. TOUPS
WELLER, WHEELUS & GREEN
550 Fannin, 5th Floor
Beaumont, TX 77701

COME now defendants The Boeing Company, The B.F. Goodrich Company, The Goodyear Tire and Rubber Company, Delta Air Lines, Inc., and Parker Hannifin Corporation and hereby give notice of removal of the above-captioned action, and in support thereof state as follows:

BASIS FOR REMOVAL

I.

This is a civil action arising from the crash of Mexicana Airlines Flight 940 in the mountains west of Mexico City on March 31, 1986. The civil action was filed in the District Court of Jefferson County, Texas on November 5, 1992, and assigned Cause No. B-144,222. The 38 named plaintiffs assert that they are the "personal representatives of the estates" of 69 passengers killed in the crash. Plaintiffs' Original Petition alleges negligence and product liability claims on behalf of those 38 named plaintiffs against The Boeing Company, The B.F. Goodrich Company, The Goodyear Tire and Rubber Company, Delta Air Lines, Inc. and Parker Hannifin Corporation.

II.

On information and belief, none of the plaintiffs are citizens of any state of the United States; all are foreign nationals residing outside the United States, primarily in Mexico. Pursuant to 28 U.S.C. § 1332(c)(2), the legal representative of the

estate of a decedent shall be deemed to be a citizen only of the same state as the decedent. On information and belief, none of the decedents whose estates are represented by plaintiffs were citizens of any state of the United States; like the plaintiffs, all decedents were foreign nationals residing outside the United States, primarily in Mexico.

III.

The defendants are citizens of the following states:

Defendant	State of Incorporation	Principal Place of Business
Boeing	Delaware	Washington
B.F. Goodrich	New York	Ohio
Goodyear Tire	Ohio	Ohio
Delta Air Lines	Delaware	Georgia
Parker Hannifin	Ohio	Ohio

None of the defendants is a citizen of Texas.

IV.

On a reasonable reading of the record, each claim on behalf of a decedent's estate involves an amount in controversy in excess of $50,000, exclusive of interest and costs. Plaintiffs' claims are based on § 71.021 of the Texas Civil Practices and Remedies Code, commonly known as the Survival Statute. Plaintiffs claim that the decedents, "during the flight of the aircraft leading up to the crash, suffered mental anguish due to fear of death, mental anguish and pain and suffering." The nature of the damages alleged is such that a judgment in excess of $50,000 per decedent, exclusive of interest and costs, is a reasonable possibility.

V.

Plaintiffs' purport to limit the amount in controversy by stating in their petition that the value of the damages sought by each decedent's estate will not exceed $50,000 and by appending to the petition an affidavit of plaintiffs' attorney stating that each claim on behalf of each decedent is for less than $50,000 exclusive of interest and court costs. However, as detailed below, despite an allegation in the petition that "[p]laintiffs bring this action as personal representatives of the estates of each decedent named below," none of the plaintiffs have in fact been appointed as personal representatives of the estate of the decedent(s) whose rights they purport to represent. Thus, no plaintiff has the authority to limit the substance or amount of claims on behalf of the decedent's estates. Plaintiffs' attempts to do so are meaningless and must be disregarded in determining the amount in controversy in this matter.

VI.

By letter dated November 25, 1992, counsel for defendant The Boeing Company tendered an affidavit to plaintiffs' attorney, Dennis C. Reich, for his signature, asking him to confirm, among other things, that plaintiffs had the necessary authority to limit the claims of each decedent's estate to no more than $50,000, and that plaintiffs' attorneys had been authorized by plaintiffs to make a binding admission on their behalf. A copy of the letter and accompanying affidavit is Attachment 1 to the Affidavit of Howard L. Close, which is attached hereto as Exhibit A. The proposed affidavit requested plaintiffs' attorney to attest in pertinent part that:

> Each Plaintiff identified in the Petition in this matter has been appointed by a qualified court as a personal representative of the estate(s) of

> the decedent(s) whose rights he or she purports to represent.

Proposed Affidavit, Attachment 1 to the affidavit of Howard L. Close, Exhibit A hereto.

VII.

On or about December 4, 1992, plaintiffs' attorney, Mitchell A. Toups, advised counsel for defendant The Boeing Company, Howard L. Close, that plaintiffs' attorneys could not sign the affidavit in the form tendered by Boeing because (1) none of the plaintiffs had been appointed as personal representatives of the estate of the decedent(s) whose rights they purported to represent (even though Plaintiffs' Original Petition alleged that each plaintiff had this status); and (2) none of plaintiffs' attorneys in this action (including Mr. Reich, who executed the affidavit appended to Plaintiffs' Petition) had actually communicated with plaintiffs on any of these subjects; their information came solely from attorneys in Mexico. Affidavit of Howard L. Close ¶ 4. Plaintiffs' attorneys sent counsel for defendant Boeing handwritten revisions to the proposed affidavit, whereby they proposed to delete in its entirety the statement that each plaintiff has been appointed by a qualified court as a personal representative of the estate of the decedent(s) whose rights he or she purports to represent as well as to delete any referenced to each plaintiff having "expressly" authorized plaintiffs' attorneys to limit the amount of damages claimed, or to plaintiffs having confirmed "to me [Mr. Reich]" that they understood they were making an irrevocable commitment. A copy of plaintiffs' handwritten revisions to the proposed affidavit is Attachment 2 to the Affidavit of Howard L. Close, Exhibit A hereto.

VIII.

Since plaintiffs were not at the time Plaintiffs' Original Petition was filed, and are not now, properly appointed per-

sonal representatives of the estates of the decedent(s) whose rights they purport to represent, neither plaintiffs, nor plaintiffs' attorneys, have the authority to limit the amount claimed by the estate of any decedent. The purported agreement of plaintiffs and their attorneys to limit the damages sought is meaningless and has no bearing on the amount in controversy in this matter.

IX.

Based on the foregoing facts, this Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332. Removal of this action is therefore proper under 28 U.S.C. § 1441(a), which authorizes removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction . . .," and 28 U.S.C. § 1441(b).

TIMELINESS OF REMOVAL

X.

A copy of the citation and Plaintiffs' Original Petition ("The Complaint"), the initial pleading setting forth plaintiffs' claim for relief, were served upon each defendant in this action on November 12, 1992. Certified copies of the citations (reduced in size) and the complaint as well as the docket sheet and all pleadings filed in the state court are attached as Exhibit "B" pursuant to 28 U.S.C. § 1446(a). Because this Notice of Removal is being filed within 30 days after service of the complaint, removal is timely under 28 U.S.C. § 1446(b).

VENUE OF REMOVED ACTION

XI.

Because this Court is the United States District Court for the district and division embracing the place where the state

court action is pending, it is the appropriate court for removal under 28 U.S.C. § 1441(a).

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was forwarded to all counsel of record on this the 11th day of December, 1992.

Respectfully submitted,

/ S /

Howard L. Close
State Bar #04406500

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/ S /

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ATTORNEYS FOR DEFENDANT, DELTA AIR LINES, INC.

/ S /

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ATTORNEYS FOR DEFENDANT,
PARKER HANNIFIN
CORPORATION

EXHIBIT A TO
DEFENDANTS' NOTICE OF REMOVAL

IN THE UNITED STATES DISTRICT
COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ALMA TORREBLANCA de AGUILAR, AS REPRESENTATIVE OF THE ESTATE OF DAVID ALBERTO AGUILAR CHAVEZ, DECEASED; IRENE de la LLATA VDA de ANZALDUA AS REPRESENTATIVE OF THE ESTATE OF CARMEN ANZALDUA de la LLATA, DECEASED; ING. HERNAN BARRIOS, AS REPRESENTATIVE OF THE ESTATE OF MARIA GUADALUPE de la CARIDAD BARRIOS AVILES, DECEASED; JORGE FEDERICO ALTSCHULER CASTRO, AS REPRESENTATIVE OF THE ESTATES OF PILAR MENA de ALTSCHULER, DECEASED; MIRIAM ALTSCHULER MENA, DECEASED; AND ALEJANDRO ALTSCHULER MENA, DECEASED; ROQUE BAUTISTA FAJARDO, AS REPRESENTATIVE OF THE ESTATE OF MARIA ESTELA BAUTISTA ABARCA, DECEASED; SARAI HERNANDES BAUTISTA, DECEASED; AND DALIA HERNANDES BAUTISTA, DECEASED; AND ANA MARIA ESPERANZA CUELLAR de BOURLON, AS REPRESENTATIVE OF THE ESTATE OF MARIA EMILIA BOURLON CUELLAR, DECEASED; ADELA CESPEDES de	CIVIL ACTION NO. 1:92CV 537

CORTINA, AS REPRESENTATIVE OF THE ESTATE OF MARIA del REFUGIO CORTINA CUELLAR, DECEASED; EDUARDO CALDERON, AS REPRESENTATIVE OF THE ESTATES OF EDUARDO CALDERON ZAVALA, DECEASED; GLORIA CALDERON SOTOMAYOR de BAUTISTA, DECEASED; CARLOS EDUARDO BAUTISTA CALDERON, DECEASED; AND LILIA BAUTISTA CALDERON, DECEASED; CARLOS de la TORRE DELGADILLO, AS REPRESENTATIVE OF THE ESTATE OF SYLVIA RIVERA PEREZ de la TORRE, DECEASED; JUAN de la O. GUZMAN, AS REPRESENTATIVE OF THE ESTATES OF HECTOR ARTURO de la O. MACIEL, DECEASED; YOLANDA BENITEZ de la O., DECEASED, AND HECTOR ARTUR de la O. BENITEZ, DECEASED; ESPERANZA ESTAVILLO DIAZ AND LUZ MARIA ESTAVILLO DIAZ, AS REPRESENTATIVES OF THE ESTATES OF HORACIO ESTAVILLO LAGUNA, DECEASED; MARIA de la LUZ DIAZ de ESTAVILLO, DECEASED; AND HORACIO ESTAVILLO DIAZ, DECEASED; LUIS GOMEZ DAZA RANGEL, AS REPRESENTATIVE OF THE ESTATE OF ADELA GOMEZ DAZA CORTINA, DECEASED; MARIA CONCEPCION GOMEZ HERNANDEZ,

AS REPRESENTATIVE OF THE ESTATES OF JESUS GOMEZ HERNANDEZ, DECEASED; AND TERESA HERNANDEZ de GOMEZ, DECEASED; DAVID L. JASQUI ELO AS REPRESENTATIVE OF THE ESTATES OF OF JACOBO JASQUI DEBBAH (DERBAH), DECEASED; RAQUEL NOAH de JASQUI, DECEASED; SOFIA JASQUI NOAH, DECEASED; TERESA JASQUI NOAH, DECEASED; AND DAVID JASQUI NOAH, DECEASED; JOHN EHRHARD KOHN CORNEJO, AS REPRESENTATIVE OF THE ESTATE OF CATIA (KATIA) KOHN PAZ de HERNANDEZ, DECEASED; MARIA MONICA RIVERO, la FUENTE de LUENGAS, AS REPRESENTATIVE OF THE ESTATE OF PALMIRA de la FUENTE RIVERO, DECEASED; ALEJANDRO MA GUADALUPE MERINO CASARIN, AS REPRESENTATIVE OF THE ESTATE OF OFELIA CASARIN ALCIBAR, DECEASED; JESUS ERNESTO MERINO ORTIZ, AS REPRESENTATIVE OF THE ESTATES OF MARGARITA del TORAL MERINO, DECEASED; MARGARITA MERINO del TORAL, DECEASED; CELIA MERINO del TORAL, DECEASED; AND MONICA MERINO del

TORAL, DECEASED; ING. EDEL OJEDA MALPICA, AS REPRESENTATIVE OF THE ESTATE OF LUIS ENRIQUE OJEDA SANTANA, DECEASED; GUILLERMO PIERDANT PEREZ, AS REPRESENTATIVE OF THE ESTATE OF HIGINIO PERIDANT QUIROZ, DECEASED; MARIA DOLOREZ ROSALES DIAZ, AS REPRESENTATIVE OF THE ESTATES OF JULIA DIAZ COBIAN de ROSALES, DECEASED; AND NATAEL GERARDO ROSALES FLORES, DECEASED; DAVID RODRIGUEZ DIAZ, AS REPRESENTATIVE OF THE ESTATES OF IMELDA ZALDIVAR MORENO de RODRIGUEZ, DECEASED; ANABEL RODRIGUEZ ZALDIVAR, DECEASED; MA GABRIELA RODRIGUEZ ZALDIVAR, DECEASED; JOSEFINA ROMERO de MATAGNE, AS REPRESENTATIVE OF THE ESTATE OF GENOVEVA BAUMGARTEN de BAUMGARTEN, DECEASED; MARIA TERESA SANTOS MUNOZ de CASTRO, AS REPRESENTATIVE OF THE ESTATE OF AGUSTIN CASTRO DIAZ, DECEASED; DELFINA GRACIELA TOVAR VDA de SOSA, AS REPRESENTATIVE OF THE ESTATE OF ENRIQUE ALEJANDRO SOSA ROJAS, DECEASED; LIC FERNANDO YZUNZA BRENA, AS REPRESENTATIVE OF THE

ESTATE OF FEDERICO YZUNZA BRENA, DECEASED; CAROLINA HUITRON ESPINOZA de YTUARDE, AS REPRESENTATIVE OF THE ESTATE OF AGUSTIN YTUARDE SALAZAR, DECEASED; OCTAVIO QUESNEL AND GRACIELA GALVAN de QUESNEL, AS REPRESENTATIVES OF THE ESTATE OF AMELIA FLORENICA QUESNEL GALVAN, DECEASED; MONICA COWLAND, AS REPRESENTATIVE OF THE ESTATE OF PETER MILES COWLAND, DECEASED; SOFIA LARTILLEAUX, AS REPRESENTATIVE OF THE ESTATES OF AYMERIC J. LARTILLEAUX, DECEASED; CHANTAL LARTILLEAUX, DECEASED; ELIZABETH LARTILLEAUX, DECEASED; ERIC LARTILLEUX, DECEASED; PIERRE LARTILLEUX, DECEASED; VIRGINIA LARTILLEUX, DECEASED; XAVIER LARTILLEUX, DECEASED; NATALIE LARTILLEUX, DECEASED; AND PIERRE LARTILLEUX, JR., DECEASED; PAUL RENEE PIAGET, AS REPRESENTATIVE OF THE ESTATE OF PHILIP LEWIS PIAGET RHORER, DECEASED; JAIME GUZMAN VAZQUEZ, AS REPRESENTATIVE OF THE ESTATE OF ANA ROSA GUZMAN FLORES, DECEASED; CARLOS ALBERTO GUADARRAMA, SR., AS REPRESENTATIVE OF THE ESTATE OF

CARLOS ALBERTO GUADARRAMA, DECEASED; DR. ROBERTO PINON LOZANO, AS REPRESENTATIVE OF THE ESTATE OF HAYDEE LOZANO de PINON, DECEASED; DR. ROBERTO PINON LOZANO AS REPRESENTATIVE OF THE ESTATE OF ROBERTO PINON PEREZ, DECEASED; AND JAIME CUKIER, AS REPRESENTATIVE OF THE ESTATES OF GOLD SHVEID de CUKIER, DECEASED; ABRAHAM CUKIER SHVEID, DECEASED; ILAN CUKIER SHVEID, DECEASED; AND URI CUKIER SHVEID, DECEASED

PLAINTIFFS.

VS.

THE BOEING COMPANY, THE B.F. GOODRICH COMPANY, THE GOODYEAR TIRE AND RUBBER COMPANY, DELTA AIR LINES, INC. AND PARKER HANNIFIN CORPORATION,

DEFENDANTS.

AFFIDAVIT OF HOWARD L. CLOSE IN SUPPORT OF DEFENDANTS' NOTICE OF REMOVAL

STATE OF TEXAS §

COUNTY OF JEFFERSON §

HOWARD L. CLOSE, being duly sworn upon oath, states:

1. I am an attorney with the law firm of Orgain, Bell & Tucker, L.L.P., 470 Orleans Street, Beaumont, Texas 77701.

2. I am an attorney of record for The Boeing Company in this matter.

3. Attached hereto as Attachment 1 is a true and correct copy of a letter and attached proposed affidavit that I sent to plaintiffs' attorney, Dennis C. Reich, by facsimile on November 25, 1992. I sent the proposed affidavit to Mr. Reich in an attempt to confirm that he in fact did have the proper authority from the appropriate persons to limit plaintiffs' claims in this matter to $50,000.00 per decedent and that such limitation covered all claims and was irrevocable.

4. On December 4, 1992, one of the plaintiffs' attorneys, Mitchell A. Toups, advised me by telephone that plaintiffs' attorneys could not sign the affidavit tendered by Boeing. He stated that to his knowledge none of the plaintiffs had been appointed as personal representatives of the estates of the decedents whose rights they purported to represent. Mr. Toups also advised me that neither he nor Mr. Reich had received any authority to limit plaintiffs' claims in this matter directly from the plaintiffs themselves. Mr. Toups advised me that both he and Mr. Reich had only dealt with attorneys in Mexico who represent the plaintiffs in order to get the approval to execute the affidavit that was attached to Plaintiffs' Original Petition.

5. Attached hereto as Attachment 2 is a true and correct copy of the proposed affidavit with handwritten revisions that I received by facsimile from Mr. Toups' office on December 4, 1992. Mr. Toups advised me that Mr. Reich would sign the affidavit only if he could (1) delete in its entirety the statement that each plaintiff has been appointed by a qualified court as a personal representative; and (2) delete any reference to each plaintiff having "expressly" authorized plaintiffs' attorneys to limit the amount of damages claimed.

/ S /
HOWARD L. CLOSE

SUBSCRIBED AND SWORN TO before me the undersigned authority on this the 11th day of December, 1992.

/ S /
Notary Public, State of Texas
My Commission Expires:_____

**ATTACHMENT 1 TO
AFFIDAVIT OF HOWARD L. CLOSE IN
SUPPORT OF DEFENDANTS' NOTICE
OF REMOVAL**

November 25, 1992

Via Facsimile

Dennis C. Reich, Esq.
Reich & Binstock
4265 San Felipe, Suite 620
Houston, TX 77027

Re: Torreblanca, et al v. The Boeing Company, et al.
OB&T File: 48145

Dear Dennis:

We have reviewed the affidavit appended to the latest version of Plaintiffs' Original Petition. The affidavit does not establish that the amount in controversy in this action does not exceed fifty thousand dollars ($50,000) per decedent.

We are enclosing an alternative affidavit that we prepared for your signature. Assuming that the statements contained in the affidavit are true and that you are properly authorized to sign it, this affidavit would establish that the plaintiffs in this action are in fact seeking no more than fifty thousand dollars ($50,000). We ask that you review the affidavit and advise us within the next ten days whether you are able and willing to sign it. If you object to part but not all of the affidavit, we ask that you identify the portions of the affidavit you are able and willing to sign.

The affidavit requires you to attest that each plaintiff has been properly appointed as a personal representative and expressly has authorized you to irrevocably agree to limit the damages claimed. We wish to review the documents and records establishing each plaintiff's appointment as a personal representative and your authority to limit the damages claimed

by each plaintiff. Please advise us whether this can be done on a cooperative basis and, if so, how soon you can make the information available to us.

Sincerely,

/ S /

Howard L. Close

HLC/sj
Enclosure
cc: Mitch Toups

AFFIDAVIT

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority on this day personally appeared DENNIS C. REICH, who, being by me here and now duly sworn, deposed and says as follows:

> "My name is Dennis C. Reich. I am over twenty-one years of age, of sound mind, capable of making this affidavit and personally acquainted with the facts herein stated.
>
> I am the attorney for each Plaintiff in this matter. Each Plaintiff identified in the Petition in this matter has been appointed by a qualified court as a personal representative of the estate(s) of the decedent(s) whose rights he or she purports to represent.
>
> Each Plaintiff in this matter expressly has granted me the authority and I hereby judicially admit that no Plaintiff herein, whether in his or her individual capacity, his or her capacity as a personal representative of the estate of a decedent, or his or her capacity as guardian or next friend of a minor, will ever seek more than fifty thousand dollars ($50,000) per decedent exclusive of interest and court costs in this action. Each Plaintiff herein also expressly has granted me the authority and I hereby agree on their behalf that this Court may enter an order which places an irrevocable cap on damages in this matter of fifty thousand dollars ($50,000)

per decedent exclusive of interest and court costs.

Finally, each Plaintiff expressly has granted me the authority and I hereby agree on their behalf that no plaintiff, whether in his or her individual capacity, his or her capacity as a personal representative of the estate of the decedent, or his or her capacity as guardian or next friend of a minor, will ever (1) seek to amend the Petition in this action; or (2) file any other claims arising out of the March 31, 1986 crash of Mexicana Airlines Flight 940 against the defendants named herein, including but not limited to claims for wrongful death, funeral and burial expenses, pecuniary loss, loss of support, love, affection, care, services, companionship, society, marital consortium, parental consortium or survivors' emotional anguish and psychological distress.

I have explained the terms of all of the agreements outlined above to each Plaintiff herein and each Plaintiff has indicated to me that he/she understands (1) the terms of each agreement; and (2) that all of the agreements are irrevocable.

I have personal knowledge of each fact set forth herein and they are true and correct."

_____

DENNIS C. REICH

SUBSCRIBED AND SWORN TO before me by the said DENNIS C. REICH on this ____ day of _____, 1992, to certify which witness my hand and seal of office.

_____
NOTARY PUBLIC, STATE OF TEXAS

My Commission Expires:

_____

_____
Typed or Printed Name of Notary

**ATTACHMENT 2 TO
AFFIDAVIT OF HOWARD L. CLOSE IN
SUPPORT OF DEFENDANTS' NOTICE
OF REMOVAL**

AFFIDAVIT

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority on this day personally appeared DENNIS C. REICH, who, being by me here and now duly sworn, deposed and says as follows:

"My name is Dennis C. Reich. I am over twenty-one years of age, of sound mind, capable of making this affidavit and personally acquainted with the facts herein stated.

I am the attorney for each Plaintiff in this matter. ~~Each Plaintiff identified in the Petition in this matter has been appointed by a qualified court as a personal representative of the estate(s) of the decedent(s) whose rights he or she purports to represent.~~

Each Plaintiff in this matter ~~expressly~~ has granted me the authority and I hereby judicially admit that no Plaintiff herein, whether in his or her individual capacity, his or her capacity as a personal representative of the estate of a decedent, or his or her capacity as guardian or next friend of a minor, will ever seek more than fifty thousand dollars ($50,000) per decedent exclusive of interest and court costs in this action. Each Plaintiff herein also expressly has granted me the authority and I hereby agree on their behalf that this Court may enter an order which places an irrevocable cap on damages in this matter of fifty thousand dollars ($50,000)

per decedent exclusive of interest and court costs.

Finally, each Plaintiff ~~expressly~~ has granted me the authority and I hereby agree on their behalf that no plaintiff, whether in his or her individual capacity, his or her capacity as a personal representative of the estate of the decedent, or his or her capacity as guardian or next friend of a minor, will ever (1) seek to amend the Petition in this action; or (2) file any other claims arising out of the March 31, 1986 crash of Mexicana Airlines Flight 940 against the defendants named herein, including but not limited to claims for wrongful death, funeral and burial expenses, pecuniary loss, loss of support, love, affection, care, services, companionship, society, marital consortium, parental consortium or survivors' emotional anguish or psychological distress.

I have explained the terms of all of the agreements outlined above to ~~each~~ the Plaintiffs herein and the ~~each~~ Plaintiff haves indicated ~~to me~~ that he/she understands (1) the terms of each agreement; and (2) that all of the agreements are irrevocable.

I have personal knowledge of each fact set forth herein and they are true and correct."

_____

DENNIS C. REICH

SUBSCRIBED AND SWORN TO before me by the said DENNIS C. REICH on this ____ day of _____, 1992, to certify which witness my hand and seal of office.

_____

NOTARY PUBLIC, STATE OF TEXAS

My Commission Expires:

_____

_____

Typed or Printed Name of Notary

Supreme Court, U.S.
FILED
AUG 9 1995
CLERK

No. 95-102

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALMA TORREBLANCA DE AGUILAR, ET AL.,

Petitioners,

—against—

THE BOEING COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT DELTA AIR LINES, INC.

MICHAEL J. HOLLAND
CONDON & FORSYTH
1251 Avenue of the Americas
New York, New York 10020
(212) 757-6870

Counsel for Respondent
DELTA AIR LINES, INC.

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals properly concluded that federal subject matter jurisdiction exists where petitioners demanded "a sum not to exceed $50,000 per decedent" in their state court complaint but where the same petitioners in previous actions demanded damages in excess of $50,000 for the same claims, where petitioners' demand violates a state statute which prohibits pleading a specific amount of damages and where the petitioners failed to establish that they were authorized to limit damages to $50,000 as legal heirs or legal representatives of the estates.

RULE 29.1 STATEMENT

Respondent Delta Air Lines, Inc. has no parent companies or any subsidiaries which are not wholly-owned.

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No. 95-102

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALMA TORREBLANCA DE AGUILAR, ET AL.,

Petitioners,

—against—

THE BOEING COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT DELTA AIR LINES, INC.

OPINIONS BELOW

The opinion of the court of appeals (Appendix, *infra*, 1a-21a)[1] is reported as *De Aguilar v. Boeing Co.*, 47 F.3d 1404 (5th Cir. 1995). The two opinions of the district court (Appendix, *infra*, 22a-34a) are unreported. A prior opinion of the Fifth Circuit Court of Appeals with respect to the claims of the petitioners is reported as *De Aguilar v. Boeing Co.*, 11 F.3d 55 (5th Cir. 1993). The earlier decision of the Fifth Cir-

[1] Respondent reproduced the opinions of the courts below as an appendix to this brief because petitioners in their appendix incorrectly retyped and omitted portions of those opinions.

cuit will be referred to in this brief as *De Aguilar I* and the decision of the Fifth Circuit in this action below will be referred to in this brief as *De Aguilar II*.

STATEMENT OF THE CASE

This action was commenced under the Texas survival statute, § 71.021 of the Texas Civil Practices and Remedies Code, seeking damages on behalf of the estates of 69 decedents killed in the crash of Mexicana Airlines ("Mexicana") flight 940 on March 31, 1986 en route from Mexico City to Puerto Vallarta, Mexico. The Boeing 727 aircraft crashed shortly after take-off from Mexico City, killing all persons aboard the aircraft.

The underlying facts of the accident have been set forth in several prior decisions. An agency of the Mexican government investigated the accident, concluding that a tire explosion in the aircraft's wheel well resulted in an in-flight fire which disabled critical aircraft systems and caused the airplane to break-up in mid-air. *De Aguilar v. Boeing Co.*, 806 F. Supp. 139, 140 (E.D. Tex. 1992), *aff'd*, 11 F.3d 55 (5th Cir. 1993).

The survival claims asserted on behalf of the estates of the same 69 decedents involved in this action have previously been litigated and dismissed in numerous courts throughout the United States on the ground of *forum non conveniens*. The following is a brief summary of each of the prior actions,[2] concluding with the decision of the court of appeals in this action (*De Aguilar II*).

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[2] A chart (Appendix, *infra*, 35a-39a) identifying the decedents named in each of the actions arising out of the crash was annexed as Exhibit "U" to the Affidavit of respondent Boeing's counsel, Richard C. Coyle, and was set forth in the record below at pages 422-427.

1. The *Rodriquez* Action

The first wrongful death action ("the *Rodriguez* action") was commenced in Bexar County, Texas, in June 1986 by the surviving relatives of 16 decedents, all Mexican nationals. All of the decedents named in the original *Rodriguez* petition were named in the petition in *De Aguilar I* and in this action (*De Aguilar II*). The *Rodriguez* action was removed by Mexicana to the United States District Court for the Western District of Texas. The Boeing Company ("Boeing") moved to dismiss the action on the ground of *forum non conveniens*. The court dismissed plaintiffs' claims against both Mexicana and Boeing on January 23, 1987 on the ground of *forum non conveniens*. *Rodriguez v. Mexicana de Avion, S.A.*, 20 Av. Cas. (CCH) 17,983 (W.D. Tex. 1987), *aff'd mem.*, 843 F.2d 498 (5th Cir.), *cert. denied*, 488 U.S. 826 (1988).

2. The *Penasco Garcia* Action

In March 1987, while the *Rodriguez* action was still pending, another group of plaintiffs ("the *Penasco Garcia* plaintiffs") suing on behalf of approximately 72 predominantly Mexican decedents, commenced similar actions against Mexicana, Boeing, Delta Air Lines, Inc. ("Delta"), The B.F. Goodrich Company ("B.F. Goodrich") and Western Airlines in the Western District of Texas and in state courts in Illinois and California.[3] Sixteen of the decedents named in *De Aguilar I* and in the present action also were named in the Illinois *Penasco Garcia* case, and of those sixteen, fourteen were also named in the *Penasco Garcia* action in Texas.

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[3] Boeing's chart (Appendix, *infra*, 35a-39a) indicates minor differences in the decedents named in the three different *Penasco Garcia* actions. Sixty-five of the decedents were named in all three *Penasco Garcia* actions, seven decedents were named in both Texas and Illinois but not California and four decedents were named in the California action who were not also named in the Texas or Illinois actions. Two of the *Penasco Garcia* decedents had previously been named in the *Rodriguez* action.

Mexicana removed the Illinois and California actions to the appropriate federal courts on the ground that Mexicana was a "foreign state" within the meaning of the Foreign Sovereign Immunities Act of 1976. 28 U.S.C. § 1603 *et seq.* The Western District of Texas action was voluntarily dismissed by plaintiffs and the action in the Central District of California was voluntarily dismissed by plaintiffs against all defendants except Mexicana.

All defendants in the action in the Northern District of Illinois moved for dismissal on the ground of *forum non conveniens* and Mexicana additionally moved for dismissal under the Foreign Sovereign Immunities Act. The court granted defendants' motion on September 21, 1987:

> We conclude that Mexico, not U.S. District Court, is the appropriate forum given that all plaintiffs are Mexican citizens and residents. The accident occurred and was investigated in Mexico with the result that most if not all of the witnesses and necessary exhibits are in that country. We adopt the well reasoned opinion of Judge Garcia, of the Western District of Texas, of January 23, 1987. Dismissal is premised upon the same conditions as imposed by Judge Garcia.

Penasco Garcia v. Mexicana de Avion, No. 87 C. 3920, slip op. at 2 (N.D. Ill. Sept. 21, 1987).

In the action pending in the Central District of California, in which only Mexicana remained as a defendant, the district court denied the motion to dismiss based upon *forum non conveniens* and Foreign Sovereign Immunities Act grounds. Mexicana filed a petition for Writ of Mandamus in the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed the district court and remanded the case with instructions to dismiss for lack of jurisdiction pursuant to the Foreign Sovereign Immunities Act. *Compania Mexicana de Aviacion, S.A. v. United States District Court*, 859 F.2d 1354, 1360 (9th Cir. 1988).

3. The *Estavillo* Action

Also in March 1987, a group of plaintiffs, some of whom also were named in the *Rodriguez* and *Penasco Garcia* actions, filed an action ("the *Estavillo* action") in state court in Los Angeles, California against Mexicana, Boeing and others on behalf of the estates of 69 decedents named in *De Aguilar I* and in the present action as well as 9 other decedents. Plaintiffs served the petition on Mexicana only, and Mexicana removed the action to federal court. The court eventually dismissed all of the unserved defendants and, after the Ninth Circuit ruled in *Compania Mexicana De Aviacion, S.A. v. United States District Court*, 859 F.2d at 1354, dismissed Mexicana on the ground of foreign sovereign immunity. *Esperanza Estavillo Dias v. Compania Mexicana de Aviacion, S.A.*, No. CV 01792, slip op. at 2 (C.D. Cal. Nov. 28, 1988).

4. The *Wolf* Action

In March 1989, alleged beneficiaries of the same 69 foreign decedents who were named in *De Aguilar I* and are named in the present action, *De Aguilar II*, filed suit against the present respondents in King County, Washington, Superior Court. The sole named plaintiff in that action ("the *Wolf* action") was a Washington State attorney named Bruce Wolf who was appointed special administrator of the decedents' estates. The 69 *Wolf* decedents were all part of the earlier dismissed *Estavillo* action in Los Angeles.[4]

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[4] In March 1989, six months after the Ninth Circuit decided *Compania Mexicana de Aviacion, S.A. v. United States District Court*, 859 F.2d 1354 (9th Cir. 1988), plaintiff Bruce Wolf brought an action against Mexicana only in the Superior Court of Washington State for King County as the personal representative of the estates of the same 69 decedents named in *De Aguilar I* and this action. Mexicana removed the *Wolf* action to federal court and, in September 1989, moved to dismiss plaintiffs' claims based on the *res judicata* effect of the Ninth Circuit's decision. Plaintiff then voluntarily dismissed the Washington action against Mexicana.

On January 19, 1990, the *Wolf* action was dismissed on Boeing's motion on the ground of *forum non conveniens*. On May 20, 1991, the Washington Court of Appeals affirmed the dismissal, and the Washington Supreme Court denied review on October 2, 1991. *Wolf v. Boeing Co.*, 61 Wash. App. 316, 810 P.2d 943, *review denied*, 117 Wash. 2d 1020, 818 P.2d 1098 (1991).

5. *De Aguilar I*

Claims on behalf of the estates of the same 69 decedents named in this action and in the *Wolf* action were next asserted in an action filed in the 60th Judicial District Court of Jefferson County, Texas on December 5, 1991. Defendants, Boeing, B.F. Goodrich, The Goodyear Tire & Rubber Company ("Goodyear"), Delta and Parker Hannafin Corporation removed the action to the United States District Court for the Eastern District of Texas. Plaintiffs thereafter moved to remand and, in support of their motion, their counsel submitted two affidavits purporting to limit each plaintiff's claim to less than $50,000. The district court denied plaintiffs' motion. *De Aguilar v. Boeing Co.*, 790 F. Supp. 693 (E.D. Tex. 1992), *aff'd*, 11 F.3d 55 (5th Cir. 1993).

Boeing thereafter moved to dismiss the action on the ground of *forum non conveniens*. The district court granted the motion and a final judgment dismissing the action was filed on September 22, 1992. *De Aguilar v. Boeing Co.*, 806 F. Supp. 139 (E.D. Tex. 1992), *aff'd*, 11 F.3d 55 (5th Cir. 1993).

The Fifth Circuit Court of Appeals affirmed the rulings of the district court and rejected plaintiffs' contention that the action should be remanded for an insufficient amount in controversy based on the post-removal affidavits of plaintiffs' counsel purporting to limit damages not to exceed $49,000 per plaintiff. *De Aguilar I*, 11 F.3d 55 (5th Cir. 1993). The Fifth Circuit concluded that "it is facially apparent that damages sought by the plaintiffs here exceed $50,000." *Id.* at 57.

The court concluded alternatively that even if the amount in controversy were not "facially apparent," the affidavits of plaintiffs' counsel were rebutted by "published precedent showing that damages in the instant case and in similar cases would probably exceed $50,000 per plaintiff" and "evidence that the plaintiffs in this action claimed damages of up to $5,000,000 in other courts for the same injuries." *De Aguilar I*, 11 F.3d at 58.

6. The *Pardo* Action Presently Pending in Mexico

Claims arising from the crash are presently pending against Mexicana in an action entitled *Pardo v. CIA Mexicana de Aviacion, S.A. de C.V.*, Action 137/88 (D. Mexico). Several of the plaintiffs in this action are parties in the Mexican action.

7. This Action (*De Aguilar II*)

Failing to defeat federal diversity jurisdiction by utilizing post removal affidavits of counsel, claims on behalf of the same 69 decedents dismissed in *De Aguilar I* were again asserted in this action which was filed in the 60th Judicial District Court, Jefferson County, Texas (the same court in which the petition was filed in *De Aguilar I*) on November 5, 1992. Unlike the petition in *De Aguilar I* in which plaintiffs did not plead a specific amount of damages, in *De Aguilar II*, those same plaintiffs, petitioners herein, specifically alleged damages of not more than $50,000 per decedent. The action was removed and the Eastern District of Texas once again denied petitioners' motion to remand (and supplemental motion to remand) and granted defendants' motion to dismiss based on *forum non conveniens* (Appendix, *infra*, 22a-23a). Petitioners appealed both orders. The Fifth Circuit Court of Appeals affirmed. *De Aguilar II*, 47 F.3d 1404 (5th Cir. 1995). Petitioners filed their petition for writ of certiorari on July 7, 1995.

In summary, claims asserted on behalf of the Mexicana flight 940 decedents have been dismissed on numerous occasions prior to their dismissal by the court of appeals below. *De Aguilar I*, 11 F.3d 55 (5th Cir. 1993), *aff'g*, 806 F. Supp. 139 and 790 F. Supp. 693 (E.D. Tex. 1992); *Rodriguez v. Mexicana de Avion, S.A.*, 20 Av. Cas. (CCH) 17,983 (W.D. Tex. 1987), *aff'd mem.*, 843 F.2d 498 (5th Cir.), *cert. denied*, 488 U.S. 826 (1988) (all 16 decedents in the *Rodriguez* action are named in the present action); *Penasco Garcia v. Mexicana de Avion*, No. 87 C. 3920 (N.D. Ill. Sept. 21, 1987) (16 of the *Penasco Garcia* decedents are named in this action); *Wolf v. Boeing Co.*, No. 89-2-06281-0, Judgment of Dismissal at 5-6 (Super. Ct. Wash. Jan. 19, 1990), *aff'd*, 61 Wash. App. 316, 810 P.2d 943, *review denied*, 117 Wash. 2d 1020, 818 P.2d 1098 (1991) (plaintiffs in *Wolf* represented the same 69 decedents named in *De Aguilar I* and the present action). Moreover, claims on behalf of the estates of the 69 decedents also were dismissed in the Central District of California on the ground that plaintiffs failed to serve their complaint within 120 days (and as against Mexicana under the Foreign Sovereign Immunities Act). *Esperanza Estavillo Dias v. Compania Mexicana De Aviacion, S.A.*, No. CV 01792, slip op. at 2 (C.D. Cal. Nov. 28, 1988). Finally, the *Pardo* action, which is pending in Mexico City, Mexico against Mexicana, names six decedents who also are named in the action before this Court.

REASONS FOR DENYING THE WRIT

A. The Court of Appeals Properly Concluded That Federal Subject Matter Jurisdiction Exists in This Action

Petitioners seek to avoid federal jurisdiction and another *forum non conveniens* dismissal by placing an illusory cap on the amount of damages demanded in their complaint to a sum below the requisite amount in controversy. *See De Aguilar I*,

11 F.3d at 58; *De Aguilar II*, 47 F.3d at 1408.[5] Petitioners believe that they will avoid a *forum non conveniens* dismissal if they can prevent the removal of this action from the Texas state court because they filed their complaint during the limited period of time in which the doctrine of *forum non conveniens* was abolished in Texas.[6]

Petitioners' reliance on *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938), to shield these claims from federal jurisdiction is misplaced. In *St. Paul Mercury*, plaintiff commenced an action in the state court seeking $4,000 in damages. Defendant removed the action based on diversity (at the time, the minimum amount in controversy for federal jurisdiction was $3,000). Plaintiff thereafter amended the complaint and, although the amended complaint also demanded $4,000, plaintiff annexed an exhibit to the amended complaint alleging that plaintiff's actual damages were only $1,380.89. The district court entered judgment for $1,162.98 and plaintiff appealed. The court of appeals concluded that the action should have been remanded for failure to meet the statutory minimum amount in controversy requirement. This Court reversed and held that the defendant was "entitled to

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[5] Petitioners' complaint demands damages "not to exceed $50,000 per decedent." Petitioners' Appendix, A78. Rule 47(b) of the Texas Rules of Civil Procedure provides that "[a]n original pleading . . . shall contain . . . (b) in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limits of the court."

[6] As the Fifth Circuit Court of Appeals correctly noted in both *De Aguilar II*, 47 F.3d at 1408, and *De Aguilar I*, 11 F.3d at 56, petitioners contend that the decision of *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991) created an opportunity for them to avoid another *forum non conveniens* dismissal. The court in *Dow* held that Texas state courts no longer recognized the doctrine of *forum non conveniens* in wrongful death actions. The statute was ultimately modified by the Texas legislature to allow *forum non conveniens* dismissals in actions commenced on or after September 1, 1993. Tex. Civ. Prac. & Rem. Code Ann. § 71.051 (1994). This action and *De Aguilar I* were both filed before the statute was modified.

invoke the jurisdiction of the Federal court, and a reduction of the amount claimed after removal did not take away that privilege." *St. Paul Mercury*, 303 U.S. at 296.

Petitioners incorrectly rely on a single sentence in *St. Paul Mercury* to support their erroneous contention that the amount of damages set forth by a plaintiff in a state court complaint absolutely controls for purposes of determining the minimum amount in controversy:

> If [plaintiff] does not desire to try his case in the Federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove.

303 U.S. at 294 (footnote omitted); *see* petitioners' brief at 25.

The *St. Paul Mercury* decision, however, establishes that the amount demanded in the complaint does not control for purposes of determining whether federal jurisdiction exists where it appears to a "legal certainty" that the claim seeks less than the requisite amount to satisfy the minimum amount in controversy requirement.

> The rule governing dismissal for want of jurisdiction in cases brought in the Federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. . . . [I]f, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the Court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed. Events occurring subsequent to the institution of suit which reduce the

> amount recoverable below the statutory limit do not oust jurisdiction.

St. Paul Mercury, 303 U.S. at 288-290 (footnotes omitted).

Petitioners contend that the "legal certainty" test applies only where the complaint is filed in federal court and they allege a conflict among the circuits as to a defendant's burden to establish that removal from state court is proper. Petitioners' brief at 25-27. Petitioners are correct to the extent that "[o]pinions regarding the defendant's burden of proof begin to diverge where a defendant seeks to remove a case where the plaintiff has specifically claimed *less* than the federal amount-in-controversy requirement." *Gafford v. General Elec. Co.*, 997 F.2d 150, 157 (6th Cir. 1993); *compare Gafford*, 997 F.2d at 158 (preponderance of the evidence standard) and *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993), *reh'g, en banc, denied*, 1993 U.S. App. LEXIS 17,385 (7th Cir. July 13, 1993) ("Defendants seeking removal may meet that burden by a preponderance of the evidence, *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 [ ] (1936) which we take to mean proof to a reasonable probability that jurisdiction exists") (footnote omitted); and *Garza v. Bettcher Industries, Inc.*, 752 F. Supp. 753, 763-64 (E.D. Mich. 1990) (preponderance of the evidence standard adopted) with *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994) ("defendant must prove to a legal certainty that plaintiff's claim must exceed $50,000").

Although courts have applied different standards to a defendant's burden on removal, the decisions in *De Aguilar II*, *Gafford*, *Shaw*, *Garza* and *Burns* demonstrate that despite a plaintiff's demand of less than the requisite amount in controversy for federal jurisdiction, an action is properly removed where the defendant establishes that the amount in controversy exceeds $50,000. Accordingly, the view advanced by petitioners at pp. 25-26 of their brief, that removal is always improper where a plaintiff limits damages below the

requisite amount of controversy in a state court complaint, is not followed by any court.

The court of appeals properly concluded that respondents met their burden of establishing that federal jurisdiction exists in this action. At the outset, petitioners' demand in the complaint is meaningless because it violated Rule 47(b) of the Texas Rules of Civil Procedure which prohibits plaintiffs from pleading specific amounts in cases of unliquidated damages. *De Aguilar II*, 47 F.3d at 1412. The court of appeals reasoned:

> [t]hese new rules have created the potential for abusive manipulation by plaintiffs, who may plead for damages below the jurisdictional amount in state court with the knowledge that the claim is actually worth more, but also with the knowledge that they may be able to evade federal jurisdiction by virtue of the pleading. Such manipulation is surely characterized as bad faith.

De Aguilar II, 47 F.3d at 1410; *see also Gafford v. General Elec. Co.*, 997 F.2d 150, 157-58 (6th Cir. 1993). Accordingly, petitioners' attempt to limit their recovery to $50,000 is illusory because petitioners' recovery in state court would not be limited to this amount.[7]

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[7] If this action were remanded, the state court would simply disregard the petitioners' artificial limitation on damages. *See e.g., In the Matter of Shell Oil Co.*, 970 F.2d 355 (7th Cir. 1992). In *Shell Oil*, plaintiff sued for a sum in excess of $15,000 but less than $50,000 contrary to an Illinois statute which precluded pleading specificity of damages. The district court noted that the pleading violated the Illinois pleading rules precluding such specificity but the district court remanded the action based on a post-removal affidavit purporting to limit damages. The Seventh Circuit issued a writ of mandamus directing the district court to rescind its order remanding the action. Acknowledging that the initial pleading of less than $50,000 could have been stricken from the petition by the state court, the court of appeals held, "the factual allegations of the complaint, and not empty words setting an illusory cap on damages, inform the jurisdictional inquiry." *Id.* at 356.

Moreover, petitioners' demand in the complaint also is illusory because these petitioners have asserted the same claims in numerous prior actions where they demanded more than the requisite amount in controversy.[8] Accordingly, the court properly concluded that the respondents met their burden of establishing that federal jurisdiction is proper. *De Aguilar II*, 47 F.3d at 1412 ("it is facially apparent that the damages rise to a level above $50,000").

The decisions on which petitioners rely are distinguishable because, unlike respondents in this action, defendants in those actions failed to meet their burden that the minimum amount in controversy exceeded $50,000. *See Laughlin v. K-Mart Corp.*, 50 F.3d 871 (10th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3068 (U.S. July 7, 1995) (No. 95-40); *Gaus v. Miles, Inc.*, 980 F.2d 564 (9th Cir. 1992); *Burns v. Windsor Ins. Co.*, 31 F.3d 1092 (11th Cir. 1994).

In *Laughlin*, the complaint alleged that the amount in controversy was in excess of $10,000 for each of the two claims and the notice of removal did not refer to an amount in controversy. *Laughlin*, 50 F.3d at 873. The Tenth Circuit held that:

> [t]he amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal . . . . The burden is on the party requesting removal to set forth, in the notice of removal itself, the '*underlying facts* supporting [the] assertion that the amount in controversy exceeds $50,000.' *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir. 1992).

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[8] As the Fifth Circuit Court of Appeals noted in *De Aguilar I*, 11 F.3d 55, 58 (5th Cir. 1993), "the same plaintiffs in this action pled damages up to $5,000,000 in other forums for the same injuries." Moreover, the plaintiffs in the *Pardo* action pending in Mexico claim substantial damages including at least $75,000 for pre-impact pain and suffering.

Laughlin, 50 F.3d at 873 (citation omitted). The *Laughlin* court determined that the action should be remanded because, although defendant set forth facts alleging that the amount in controversy exceeded the jurisdictional minimum of $50,000 in its jurisdictional brief, defendant failed to include any of these facts in its notice of removal. *Id.* The court of appeals in this action held that respondents established "in their notice of removal that the amount in controversy exceeded $50,000." *De Aguilar II*, 47 F.3d at 1407.

Similarly, in *Gaus v. Miles, Inc.*, 980 F.2d 564, 565 (9th Cir. 1992), plaintiff filed an action in the state court seeking damages "in excess of $10,000." Defendant removed alleging in the removal petition that "the matter in current controversy . . . exceeds the sum of $50,000." *Id.* The court determined that the action should be remanded because the defendant "offered no facts whatsoever" to support federal jurisdiction. *Id.* at 567.

Petitioners also rely on *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1093 (11th Cir. 1994). In *Burns*, plaintiff filed an action in state court seeking "not more than $45,000" but admitted to the federal court that "she may, if circumstances change" amend the complaint to seek more damages. The defendant removed and the district court denied plaintiff's motion to remand. The Eleventh Circuit vacated and remanded, holding:

> [b]ecause removal is only permissible when plaintiff's claim could have been filed in federal court originally, we must look to plaintiff's claim to determine whether removal was appropriate. Plaintiff's complaint specifically requests $45,000 in damages. Therefore, no jurisdiction exist[s] on the face of plaintiff's claim. So, the critical question is to what extent must defendant prove jurisdiction exists despite plaintiff's express claim to less than the minimum jurisdictional sum?

> We believe the defendant's burden of proof must be a heavy one . . . . We will not assume—unless given reason to do so—that plaintiff's counsel has falsely represented, or simply does not appreciate, the value of his client's case.

Id. at 1095.

The *Burns* court held that defendant had not met its burden of establishing that, notwithstanding the limited amount of damages demanded in the complaint, the minimum amount in controversy was sufficient to confer federal jurisdiction at the time of removal. The reasoning in *Burns* differs from the Fifth Circuit in this action in the extent of the burden on defendant to establish that removal is proper. In *Burns*, the court held that defendant "must prove to a legal certainty that plaintiff's claim must exceed $50,000." *Id.* at 1095. The *Burns* court relied on the Fifth Circuit's decision in *Kliebert v. Upjohn Co.*, 915 F.2d 142 (5th Cir. 1990), *vacated for reh'g en banc*, 923 F.2d 47 (5th Cir.), *appeal dism'd per settlement*, 947 F.2d 736 (5th Cir. 1991).

The court of appeals in this action rejected the standard it previously articulated in *Kliebert* because that standard fails to "protect defendants from plaintiffs who seek to manipulate their state pleadings to avoid federal court while retaining the possibility of recovering greater damages in state court." *De Aguilar II*, 47 F.3d at 1411. To prevent petitioners from successfully engaging in such a bad faith manipulation of their pleadings, the court of appeals below properly concluded that the amount of plaintiff's claim controls "unless the defendant can show by a preponderance of the evidence that the amount in controversy is greater than the jurisdictional amount." *De Aguilar II*, 47 F.3d at 1412.

The difference in the burden on defendant as enunciated in *Burns* and by the Fifth Circuit in *De Aguilar II* does not provide a basis to grant the writ in this action, however, because even the *Burns* court acknowledged that where a plaintiff's

counsel falsely represented the value of the case, the defendant has met its burden of establishing that removal is proper. *Burns*, 31 F.3d at 1095. Petitioners' prior claims seeking more than the minimum amount in controversy in numerous other fora constitutes the type of bad faith effort to manipulate their state pleadings, *see De Aguilar II*, 47 F.3d at 1411, that would not be tolerated under any standard. Accordingly, the court of appeals properly concluded that the respondents established that petitioners' claims exceed $50,000 and the decisions relied upon by petitioners do not support their contention that there is a conflict among the circuits which should be resolved by granting the writ in this action.

B. The Court of Appeals Properly Held That Petitioners Were Not Authorized to Limit the Recovery of the Estates of the Decedents

The court of appeals properly concluded not only that respondents established that the amount in controversy exceeds $50,000, but also that petitioners were unable to show that their recovery would not exceed $50,000. *De Aguilar II*, 47 F.3d at 1412.

> [A] plaintiff, in a case for unliquidated damages, cannot, absent a further showing, avoid removal by pleading for damages under the jurisdictional amount where a state rule prevents such pleading and where defendants are able to show that it is facially apparent that the amount in controversy exceeds $50,000.

Id. at 1413.

The attempt of petitioners to cap their damages at $50,000 is thus illusory not only because the demand violates Rule 47(b) of the Texas Rules of Civil Procedure and because petitioners have demanded far more than $50,000 in previous actions, but also because petitioners did not make a "further showing" that removal was improper by establishing that they are the legal representatives or legal heirs authorized to limit

the damages recoverable by the estates. *De Aguilar II*, 47 F.3d at 1414-15.

1. The Fifth Circuit Properly Held That Petitioners Failed to Establish That They are the Legal Representatives of the Estates

Petitioners alleged in the complaint that they are the legal representatives of the estates of the decedents and brought this action pursuant to Section 71.021 of the Texas Civil Practices and Remedies Code, the Texas survival statute.[9] Petitioners attached to their complaint an affidavit of one of their attorneys stating that petitioners agreed to an irrevocable cap on recoverable damages. *De Aguilar II*, 47 F.3d at 1407. Respondents attempted to ascertain whether the affidavit of counsel constituted a binding and irrevocable limitation on the damages of the respective estates because it was not clear from the affidavit whether the petitioners had been appointed legal representatives of the estates and whether petitioners had authorized their counsel to make such a binding and irrevocable admission. *Id.* Petitioners refused to confirm that they had been appointed by a qualified court to be the legal representatives of the estates and, thereafter, conceded that they brought this action only as legal heirs and not as legal representatives. *Id.* at 1407, 1414-15.

Based on the foregoing, the Fifth Circuit properly concluded that petitioners "abandoned" their claim as the legal representatives of the estates. *De Aguilar II*, 47 F.3d at 1414-15. Petitioners offered no proof that they are the legal representatives of the estates of decedents and, accordingly, they do not have the authority to pursue and limit these claims to $50,000. *See Bozeman v. Folliott*, 556 S.W.2d 608, 614 (Tex.

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[9] Tex. Civ. Prac. & Rem. Code § 71.021(b) provides: "A personal injury action survives to and in favor of the heirs, legal representatives, and estate of the injured person. The action survives against the liable person and the person's legal representatives."

Civ. App. 1977); *Martinez v. Angerstein*, 517 S.W.2d 811, 816 (Tex. Civ. App. 1974); Texas Probate Code §§ 178, 189.

The court of appeals also affirmed the district court's rejection of petitioners' argument that under Texas pleading rules, respondents waived their right to challenge the authority of petitioners to act as legal representatives because respondents did not file a plea in abatement or a verified denial. Federal pleading rules, rather than state pleading rules, apply in federal court. *See Bowers v. Firestone Tire & Rubber Co.*, 800 F.2d 474, 479 (5th Cir. 1986) (once an action is removed from state court to federal court, Federal Rules of Civil Procedure govern pleading requirements); *Consolidated Cigar Co. v. Texas Commerce Bank*, 749 F.2d 1169, 1174 (5th Cir. 1985).

Respondents complied with Rules 11 and 12 of the Federal Rules of Civil Procedure and, as such, were not required to file a plea in abatement or verified denial in this action. *See Sneed Shipbuilding, Inc. v. Spanier Marine Corp.*, 125 F.R.D. 438 (E.D. Tex. 1989). Accordingly, respondents did not waive their right to challenge the authority of petitioners to bring this action as the legal representative of the estates and to limit the damages sought on behalf of the estates of decedents.

2. The Fifth Circuit Properly Held That Petitioners Failed to Establish That They Have the Authority to Limit These Claims as Legal Heirs on Behalf of the Estates

The requirements to pursue a claim as the legal heir of an estate are different from the requirements to pursue a claim as the legal representative of an estate. *See Handley v. City of Seagoville*, 798 F. Supp. 1267, 1270 (N.D. Tex. 1992). Legal heirs can prosecute a survival cause of action on behalf of an estate if they allege (1) there is no administration of the estate pending, (2) there is no necessity for administration of the estate, and (3) they are the only heirs of the decedent. *Lozano*

v. Smith, 718 F.2d 756, 773 n. 38 (5th Cir. 1983); *Cole v. Franklin Life Ins. Co.*, 93 F.2d 620, 624 (5th Cir. 1937); *Frazier v. Wynn*, 472 S.W.2d 750, 752 (Tex. 1971); *see also Martinez v. Angerstein*, 517 S.W.2d 811, 816-17 (Tex. Civ. App. 1974) (Plaintiff failed to offer evidence that she was the sole heir of husband's estate); *Sustaita v. Valle*, 38 S.W.2d 638, 640-41 (Tex. Civ. App. 1931) (Plaintiff did not offer evidence that she was the sole surviving heir of her father's estate).

Under Texas law, therefore, all potential legal heirs to an estate are indispensable parties to a survival action involving a decedent's estate. *See Martinez*, 517 S.W.2d at 816; *Phillips v. Teinert*, 493 S.W.2d 584, 585 (Tex. Civ. App. 1973). The Fifth Circuit properly held that petitioners did not allege any of the requisite elements in this action and, as a result, petitioners cannot compromise the claims of the estates. *De Aguilar II*, 47 F.3d at 1415.

It is undisputed that petitioners are not the sole heirs of decedents named in this action. In fact, petitioners dropped 42 of the heirs, which includes all 20 minors, who were named as plaintiffs in the *De Aguilar I* complaint. *De Aguilar II*, 47 F.3d at 1415. Moreover, petitioners also dropped the one hundred "Doe" plaintiffs named in the previous complaint. *Id.* The Fifth Circuit reasoned that the inclusion of "Doe" plaintiffs in the complaint in *De Aguilar I* indicates that there exists uncertainty as to the identity of all the heirs. *Id.* Counsel for petitioners conceded that all legal heirs were not represented in this action and that prior complaints in other actions noted additional survivors would be named at a later date. *Id.* Because petitioners failed to establish that all legal heirs are parties to this action, they lack the authority as legal heirs under Texas law to limit the damages recoverable on behalf of the estates of the decedents.

The Fifth Circuit properly applied Texas law in determining whether petitioners have the authority as legal heirs to limit the damages sought by the estates. The court correctly

held that in a diversity action a federal court must apply the choice-of-law rules of the state in which it sits. *De Aguilar II*, 47 F.3d at 1413. Petitioners brought this action in Texas pursuant to the Texas survival statute, but seek to apply Mexican law to the issue of their authority to maintain and compromise the claims of the decedents. The Fifth Circuit correctly applied the most significant relationship test and, after careful analysis, held that under Texas law petitioners lack the authority as legal heirs to bring this action on behalf of the estates of decedents under the Texas survival statute. *Id.* at 1413-1414.

Moreover, even if Mexican law applied to this issue, petitioners have not demonstrated that an individual heir can compromise a claim on behalf of all of the persons who have an interest in a decedent's estate. Accordingly, petitioners failed to provide support for their contention that under Mexican law they would have the authority to pursue these claims and limit damages to $50,000.

Based on the foregoing, the Fifth Circuit properly held that petitioners failed to meet their burden in establishing that they are the legal representatives or legal heirs authorized to limit the damages recoverable to the estates of the decedents.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-5333

March 7, 1995

Alma Torreblanca DE AGUILAR, *et al.*,

Plaintiffs-Appellants,

—v.—

BOEING COMPANY, *et al.*,

Defendants-Appellees.

Benton Musslewhite, Mary Blair Martin, Houston, TX, Mitchell A. Toups, Weller & Green, Beaumont, TX, Dennis C. Reich, Reich & Binstock, Houston, TX, for appellants.

Howard Louis Close, Orgain Bell & Tucker, Beaumont, TX, Richard C. Coyle, Seattle, WA, for Boeing Co.

Gerald Leigh Bracht, Laura Jean Ware, Mayor Day Caldwell & Keeton, Houston, TX, for BF Goodrich Co./Goodyear Tire.

Michael J. Holland, Condon & Forsyth, New York City, for Delta Air Lines.

Don Swaim, George Steven McCall, Kern & Wooley, Irving, TX, for Parker Hannifin Corp.

Appeal from the United States District Court for the Eastern District of Texas.

Before SMITH AND EMILIO M. GARZA, *Circuit Judges*, and STAGG,* *District Judge*.

JERRY E. SMITH, *Circuit Judge*:

Plaintiffs, the relatives of persons who died in an airline crash in Mexico, appeal the district court's denial of their motion to remand to state court, the failure of the district court to strike or sever the third party complaint by defendant Boeing Company ("Boeing"), and the dismissal on the ground of *forum non conveniens* ("f.n.c."). Concluding that the district court did not err, we affirm.

I.

On March 31, 1986, a Mexicana Airlines jet crashed near Mexico City, killing everyone on board. An investigation concluded that a tire exploded in the wheel well while the plane was in flight, causing an in-flight fire that eventually caused the plane to explode.

II.

Relatives and personal representatives of the estates of those who died filed several lawsuits throughout the United States and in Mexico. In every lawsuit filed in the United

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* District Judge of the Western District of Louisiana, sitting by designation.

States, the action has been either voluntarily dismissed by the plaintiffs or dismissed on the basis of foreign sovereign immunity or f.n.c.[1]

Plaintiffs have been determined to find a United States forum in which to try their case. In November 1992, they filed this action in Texas state court, claiming to be the personal representatives of the estates of each decedent and the legal heirs of the decedents pursuant to the Texas Survival Statute, TEX.CIV.PRAC. & REM.CODE ANN. § 71.021 (Vernon 1986). The plaintiffs charged negligence and products liability against Boeing, B.F. Goodrich, Goodyear Tire and Rubber, Delta Airlines, and Parker Hannifin Corporation. Under TEX.R.CIV.P. 47, plaintiffs were not allowed to plead for a specific amount of damages.[2]

After defendants removed the case to federal court in the Eastern District of Texas, plaintiffs filed affidavits executed by certain plaintiffs and by the plaintiffs' attorneys, purporting to limit the damages they were seeking, and moved to remand on the ground that the $50,000 jurisdictional amount requirement was not satisfied. *See* 28 U.S.C. § 1332. The district court denied remand, holding that the affidavits were irrelevant because "jurisdiction attaches at the time of removal, and subsequent events do not oust the court of jurisdiction." *De Aguilar v. Boeing Co.*, 790 F.Supp. 693, 694 (E.D.Tex.1992). Subsequently, however, this court decided *Asociacion Nacional de Pescadores v. Dow Quimica de Colombia S.A.* ("ANPAC"), 988 F.2d 559 (5th Cir. 1993), *cert. denied*, ___U.S. ___, 114 S.Ct. 685, 126 L.Ed.2d 653 (1994), concluding that post-removal affidavits sometimes

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[1] *See de Aguilar v. Boeing Co.*, 11 F.3d 55 (5th Cir.1993); *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354 (9th Cir.1988); *Rodriguez v. Mexicana de Avion, S.A.*, 1987 WL 275695 (W.D.Tex 1987), *affd mem.*, 843 F.2d 498 (5th Cir.), *cert. denied*, 488 U.S. 826, 109 S.Ct. 76, 102 L.Ed.2d 53 (1988); *Wolf v. Boeing Co.*, 61 Wash.App. 316, 810 P.2d 943, *review denied*, 117 Wash.2d 1020, 818 P.2d 1098 (1991).

[2] The rule states, "An original pleading . . . shall contain . . . (b) in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limits of the court."

can be relevant where the jurisdictional amount question is unresolved. *Id.* at 565.

The district court *a quo* further noted that, even if it had considered the affidavits relevant, the complaint named one hundred unknown plaintiffs who were not bound by the affidavits, and plaintiffs' counsel could not bind minor beneficiaries (constituting approximately twenty of the named plaintiffs) to judgments in wrongful death suits without leave of court. *De Aguilar,* 790 F.Supp. at 695. The claims later were dismissed on f.n.c. grounds. *De Aguilar v. Boeing Co.,* 806 F.Supp. 139 (E.D.Tex.1992). The court held that direct estoppel barred the plaintiffs from relitigating the f.n.c. dismissal. Courts in Illinois, Washington, and the Western District of Texas had already ruled on this matter. *Id* at 142. Alternatively, the court found that under traditional f.n.c. criteria, the Eastern District of Texas would not be a convenient forum. *Id* at 142-43.

This court affirmed the denial of the motion to remand and the dismissal on estoppel and f.n.c. grounds. *De Aguilar v. Boeing Co. ("de Aguilar I"),* 11 F.3d 55 (5th Cir.1993). We held that the district court had properly disregarded the affidavits because it was "facially apparent" that the damages sought by each plaintiff exceeded $50,000. *Id.* at 57. Alternatively, we noted that the attorney affidavits were not unrebutted by evidence from the defendants. *Id.* at 57-58. These points distinguished *de Aguilar I* from *ANPAC.*

ANPAC involved claims that were not facially likely to exceed the jurisdictional amount. *ANPAC,* 988 F.2d at 565. In addition, in *ANPAC,* the only "evidence" the defendants produced to rebut the plaintiffs' attorneys' affidavits was the original notice of removal, which merely stated that the matter in controversy exceeded $50,000. *Id.* The *de Aguilar I* court noted that the defendants in that case had produced testimonial evidence and published precedent that indicated that the matter in controversy indeed exceeded $50,000. *De Aguilar I,* 11 F.3d at 58.

In the alternative, the plaintiffs in *de Aguilar I* argued that the original notice of removal was invalid because the defen-

dants failed to prove that the amount in controversy exceeded $50,000. We rejected this argument because defendants had shown that plaintiffs had pled damages of up to $5,000,000 in other fora for the same injuries. *Id.*

In the instant case, shortly after the district court had dismissed the original claims, plaintiffs' attorneys filed another petition in state court. In this petition, at issue now, the plaintiffs dropped forty-two of the heirs, including all of the minors, and any mention of unnamed 'Doe" plaintiffs. More importantly, plaintiffs, in apparent violation of TEX.R.CIV.P. 47, described the amount of their claim by specifically alleging that their damages did not exceed $50,000. Plaintiffs attached to the original petition an affidavit of attorney Dennis Reich stating that plaintiffs had agreed to an irrevocable cap on the amount of damages that could be awarded.

After service, defendants attempted to clarify whether Reich's affidavit constituted a binding limitation on the respective estates' damages. Howard Close, counsel for Boeing, sent Reich a letter asking for an amendment to the affidavit, or a new affidavit, in which Reich would attest that the plaintiffs had been appointed the personal representatives of the estates and had expressly authorized Reich to make a binding and irrevocable admission on their behalf.

One of the plaintiffs' attorneys, Mitchell Toups, had a discussion with Close about the proposed amendments to Reich's affidavit. The parties appear to dispute exactly what took place, though both sides agree that plaintiffs' counsel refused to say that the plaintiffs had been appointed by a qualified court as the personal representatives of the estates. According to defendants, Toups also said that none of the plaintiffs' American attorneys had actually talked to the plaintiffs. Plaintiffs claim that the reason they refused to acknowledge that they had been appointed the personal representatives of the estates was that they were suing as heirs, not representatives.

Defendants concluded that the plaintiffs named in the petition were simply *some* of the heirs of the decedents and did not have the authority to limit damages. As a result, defen-

dants once again removed to federal court in the Eastern District of Texas, establishing in their notice of removal that the amount in controversy exceeded $50,000.

Three months after removal, plaintiffs filed a supplemental motion to remand for lack of jurisdiction and attached an affidavit from a Mexican lawyer, Guadalupe Bistrain, who was one of the plaintiffs' attorneys. Bistrain swore that she had received explicit authority from each of the named plaintiffs to limit damages to $50,000. The district court determined that the plaintiffs had not shown the necessary authority to limit damages and ruled that the amount in controversy exceeded $50,000.

Defendants alleged an additional basis for federal jurisdiction. In December 1992, Boeing filed a third party complaint against Mexicana Airlines, which on January 15, 1993, filed a memorandum that claimed status as a "foreign state" under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611. Plaintiffs filed a motion to strike or, in the alternative, sever Boeing's third party claim. The district court denied this motion when it denied the motion to remand. Defendants subsequently moved to dismiss on f.n.c. grounds; the court granted this motion.[3]

III.

Since the crash, plaintiffs have made repeated attempts to locate an American forum. There are actions pending in the Mexican courts also. The Supreme Court of Texas had held that the doctrine of f.n.c. no longer applied in Texas wrongful death actions. *See Dow Chemical Co. v. Alfaro,* 786 S.W.2d 674 (Tex.1990), *cert. denied,* 498 U.S. 1024, 111 S.Ct. 671, 112 L.Ed.2d 663 (1991). The Texas Legislature then overruled *Alfaro. See* TEX.CIV.PRAC. & REM.CODE ANN.

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[3] There is no merit to the plaintiffs' appeal of the f.n.c. dismissal. We affirmed, in *de Aguilar I,* 11 F.3d at 58-59, the dismissal on f.n.c. grounds. Thus, if we decide that there was federal jurisdiction in this case, the f.n.c. dismissal is law of the case.

§ 71.051; *'21' Int'l Holdings v. Westinghouse,* 856 S.W.2d 479 (Tex.App.—San Antonio 1993, no writ). The new statute, however, applies only to causes of action filed on or after September 1, 199?. Thus, plaintiffs obviously prefer Texas state court to federal court, where f.n.c. applies.

IV.

As we have stated, plaintiffs' state court petition averred that they were seeking no recovery in excess of $50,000. During oral argument, plaintiffs characterized their claim as a plea for a specific amount of damages. They argue that *de Aguilar I* was premised on the fact that the complaint in that case "did not specify an amount of damages." *De Aguilar I,* 11 F.3d at 57.

Indeed, strictly speaking, plaintiffs have not alleged a specific amount of damages, as the amount they claim can range from $1 to $50,000. We will treat the claim, however, as one for a specific amount of damages.[4] Plaintiffs have labored to specify one "magic" number in their complaint, i.e. $50,000. We regard such a complaint as more like a claim for one sum rather than a claim for an unlimited or an unspecified amount of damages; to reason otherwise would put form over substance. As a functional matter, plaintiffs are attempting to avoid federal jurisdiction. This goal is the same whether they pick a number such as $49,999 or merely announce a ceiling that, conveniently, is barely within the statutory limit.

Defendants, as on all previous occasions, seek to retain this case in federal court. In general, defendants may remove a civil action if a federal court would have had original jurisdiction. *See* 28 U.S.C § 1441(a). In this particular case, jurisdiction is asserted on the basis of diversity of citizenship. 28 U.S.C. § 1332. The removing party bears the burden of establishing that federal jurisdiction exists. *Gaitor v. Peninsulur & Occidental S.S. Co.,* 287 F.2d 252, 253-54 (5th Cir.1961).

"Unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good

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[4] This critical distinction renders ANPAC inapposite.

faith." St. *Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288, 58 S.Ct. 586, 590 82 L.Ed. 845 (1938). Most discussions of jurisdictional amount in removal cases begin with *St. Paul Mercury.*

In St. *Paul Mercury,* the Court announced the now famous "legal certainty" test for diversity cases: In order for a federal court to decline jurisdiction, "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount." *Id.* at 289, 58 S.Ct. at 590. Many courts have applied the "legal certainty" language to jurisdictional amount questions in remand cases;[5] there is, however, disagreement as to exactly what a plaintiff has to show to a legal certainty to defeat federal jurisdiction.

In *St. Paul Mercury,* the plaintiff originally alleged damages above the jurisdictional amount in state court but amended the complaint in federal court to state less than the required amount. The Court held that the subsequent amendment could not strip the federal court of jurisdiction, provided that the original claim for damages was made in good faith. The "legal certainty" test was articulated in the Court's more general discussion of jurisdiction:

> The intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts. The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. Nor does the fact that the complaint discloses the existence of a valid defense to the claim. But if, from the face of the plead-

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[5] *E.g., Hale v. Billups of Gonzales, Inc.*, 610 F.Supp. 162, 164 (M.D.La.1985); *Locklear v. State Farm Mut. Auto. Ins. Co.*, 742 F.Supp. 679 (S.D.Ga.1989).

> ings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed, or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed. Events occurring subsequent to the institution of the suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction.

Id. 303 U.S. at 288-90, 58 S.Ct. at 289-90 (footnotes omitted).

The above discussion and, hence, the legal certainty test, contemplate the "typical" diversity situation.[6] As one court has indicated, the legal certainty test "is explicitly premised on the assumption that the amount in controversy is met by the express allegations of the plaintiff's complaint and is limited in utility to cases in which the plaintiff himself has placed the requisite jurisdictional amount in controversy by requesting damages in excess of the jurisdictional amount." *Garza v. Bettcher Indus., Inc.*, 752 F.Supp. 753, 755 (E.D.Mich.1990).

This court has indicated that the legal certainty test does not apply in a remand situation where the plaintiff has alleged an indeterminate amount of damages. In *de Aguilar I,* we stated that "[w]hen the plaintiff's complaint does not allege a specific amount of damages, the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds $50,000." 11 F.3d at 58 (citing *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir.1992); *Garza*, 752 F.Supp. at 763). *See also Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1094 (11th Cir.1994) (noting that in the "typical" removal case "defendant can remove to federal court if he can show, by a preponderance of the evidence, facts supporting jurisdiction").

The question in this case is different from that in both the typical diversity situation and the typical removal situation.

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[6] In a typical diversity situation, the plaintiff files a suit in federal court alleging damages in excess of the jurisdictional amount.

Here, the plaintiffs, in a bold effort to avoid federal court, have specifically alleged that their respective damages will not exceed the jurisdictional amount.

Plaintiffs have correctly cited the provision in *St. Paul Mercury* that a plaintiff who does not "desire to try his case in federal court . . . may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove." 303 U.S. at 294, 58 S.Ct. at 593. The inquiry, however, does not end merely because the plaintiff alleges damages below the threshold. The face of the plaintiff's pleading will not control if made in bad faith.

Moreover, the above statement from *St. Paul Mercury* plainly was premised on the notion that the plaintiff would not be able to recover more in state court than what was alleged in the state court complaint. So, for example, in *Woods v. Massachusetts Protective Ass'n*, 34 F.2d 501 (E.D.Ky.1929), cited in *St. Paul Mercury* in support of the above-quoted passage, the plaintiff sued for an amount under the jurisdictional limit. Under the state provision in that case, "if there had been no removal and an answer had been filed, plaintiff would not have been entitled to judgment for more than [the amount for which plaintiff sued]." *Id.* at 504.[7]

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[7] *See also Iowa Cent. Ry. v. Bacon*, 236 U.S. 305, 309, 35 S.Ct. 357, 358, 59 L.Ed. 591 (1915) (state pleading for less than jurisdictional amount approved where "[t]he state court had authority to determine the effect of the prayer to the petition and it decided that, under the petition, no more than the amount prayed for could be recovered in the action"); *Harley v. Firemen's Fund Ins. Co.*, 245 F. 471, 476 (W.D.Wash.1913) (noting that "the initial pleading, and the only pleading filed in the state court . . . fixes the amount in controversy in this case at [an amount below the jurisdictional amount] and no greater sum can be recovered"); *Maine v. Gilman*, 11 F. 214, 215 (C.C.D.Me,1882) ("In the mode of pleading adopted in Maine the *ad damnum* binds the plaintiff as a maximum, and a judgment for more is erroneous, or, at least, if not technically erroneous would be irregular and improper."); 1A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.157[6], at 133-34 (2d ed. 1993) (stating that plaintiff "may prevent removal by the expedient of suing for less than the jurisdictional amount unless his attempted waiver of the balance is legally ineffective").

The majority of states now, however, have followed the example of FED.R.CIV.P. 54(c) and do not limit damage awards to the amount specified in the ad damnum clause of the state pleading. See Burns, 31 F.3d at 1097 n. 11. In fact, many states, like Texas, have enacted rules that strictly prohibit plaintiffs from pleading for specific amounts in cases of unliquidated damages.

These new rules have created the potential for abusive manipulation by plaintiffs, who may plead for damages below the jurisdictional amount in state court with the knowledge that the claim is actually worth more, but also with the knowledge that they may be able to evade federal jurisdiction by virtue of the pleading. Such manipulation is surely characterized as bad faith. *See Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 507 (5th Cir.1985) (stating that "tactical manipulation [by the] plaintiff cannot . . . be condoned") (quoting *Austwick v. Board of Educ.*, 555 F.Supp. 840, 842 (N.D.Ill.1983)). Likewise, as one treatise has indicated,

> if the prayer for relief must be ignored under applicable principles of law and plaintiff can, therefore, recover more on his state claim than the jurisdictional minimum, the case is removable; and, where plaintiff's cause of action and the relief actually sought clearly involve a controversy in excess of the required amount, removal is not defeated by a monetary prayer for less than the amount.

1A MOORE, *supra*, ¶ 0.158, at 204-05 (footnotes omitted).[8]

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[8] The Seventh circuit has stated:

> *St. Paul* held that a plaintiff may not obtain a remand by amending the complaint to seek less than the jurisdictional amount. This principle has led some courts to hold that removal is proper, although the complaint asks for less than the jurisdictional amount, when state law permits a court to award more and the court is likely to do so if it decides in the plaintiff's favor.

In re Shell Oil Co., 966 F.2d 1130, 1131 (7th Cir. 1992) (citing *Cole v. Freightliner Corp.*, 1991 WL 42163, 1991 U.S.Dist. LEXIS 3408 (N.D.Ill.); *Garza*; *Johnson v. Core-Vent Corp.*, 1990 WL 51253, 1990 U.S.Dist. LEXIS 4225 (N.D.Ill.); *Locklear v. State Farm Mut. Auto. Ins.*

Accordingly, we hold that if a defendant can show that the amount in controversy actually exceeds the jurisdictional amount, the plaintiff must be able to show that, as a matter of law, it is certain that he will not be able to recover more than the damages for which he has prayed in the state court complaint. Such a rule is necessary to avoid the sort of manipulation that has occurred in the instant case.

The exact extent of the burden on the defendant in this situation was addressed by a panel majority of this court in *Kliebert v. Upjohn Co.*, 915 F.2d 142, 147 (5th Cir.1990), *vacated for reh'g en banc*, 923 F.2d 47 (5th Cir.), *appeal dism'd per stipulation of settlement*, 947 F.2d 736 (5th Cir.1991). Having been vacated, *Kliebert* is no longer precedent in this court, but its analysis is useful.

In *Kliebert*, the plaintiffs alleged a specific dollar amount of damages that was less than the federal jurisdictional amount. The panel majority held that to remove, the defendants would have to show that it was legally certain that plaintiffs would recover more than the jurisdictional amount. *Id.* at 146. Thus, the defendants would have to show that "if a jury awarded less than [the jurisdictional amount] the court would be required to grant a new trial." *Id.*

The onerous nature of this burden stands in direct contrast to the analysis of several district courts that have stated the removal inquiry as a type of "converse legal certainty test." Under this formulation, defendant "has the burden of proving that it does not appear to a legal certainty that the claim is actually for less than the requisite amount." *Hale*, 610 F.Supp. at 164. Courts elsewhere have restated the test and required

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Co., 742 F. Supp. 679 (S.D.Ga.1989); *Mutual First, Inc. v. O'Charleys, Inc.*, 721 F.Supp. 281 (S.D.Ala.1989); *Corwin Jeep Sales & Serv., Inc. v. American Motors Sales Corp.*, 670 F.Supp. 591 (M.D.Pa. 1986); *Steele v. Underwriters Adjusting Co.*, 649 F.Supp. 1414 (M.D.Ala.1986); *Hale v. Billups of Gonzales, Inc.*, 610 F.Supp. 162 (M.D.La.1985)). *But see Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1097 (11th Cir.1994) (stating that permitting removal where the plaintiff is not bound by his state pleading but pleads an amount of damages below the jurisdictional amount "would allow state rules of procedure to determine when federal jurisdiction existed" and "could lead to inconsistent application of federal jurisdictional rules") (footnote omitted).

that the defendant show "'that there is a probability that the value of the matter in controversy' exceeds the jurisdictional amount." *Corwin Jeep Sales*, 670 F.Supp. at 595 (quoting *Cunningham v. Ford Motor Co.*, 413 F.Supp. 1101, 1103 (D.S.C.1976)).

In the present case, the district court held that the removing defendant had to establish that there is "some possibility" that the plaintiff could recover over $50,000. This formulation is supported by language from *Foret v. Southern Farm Bureau Life Ins.* Co., 918 F.2d 534, 537 (5th Cir.1990), in which we held that it was not error for the district court to exercise jurisdiction over a case where "the plaintiffs could have recovered more than $50,000."

Both sides argue that the preponderance of the evidence standard announced in *de Aguilar I* should apply in this case. We agree. As the dissenting judge indicated in *Kliebert,* the strict test adopted by the *Kliebert* majority "seems to conflict with our past decisions that have stated that the standard for determining jurisdictional amount should favor 'those parties seeking to invoke the jurisdiction of a federal district court.' " *Kliebert,* 915 F.2d at 148 (Jolly, J., dissenting) (quoting *Opelika Nursing Home v. Richardson,* 448 F.2d 658, 663 (5th Cir. 1971)).

The *Kliebert* standard also fails adequately to protect defendants from plaintiffs who seek to manipulate their state pleadings to avoid federal court while retaining the possibility of recovering greater damages in state court following remand. This court has spoken adamantly of "preventing the plaintiff from being able to destroy the jurisdictional choice that Congress intended to afford a defendant in the removal statute." *Boelens,* 759 F.2d at 507.

We regard, however, the "some possibility" standard applied by the district court and the "converse legal certainty" test, which essentially require that the defendant merely show that plaintiff *could* recover more than the jurisdictional amount, as too permissive. *See Burns,* 31 F.3d at 1092 ("The *possibility* that plaintiff may in the future seek or recover more damages is insufficient to support federal jurisdiction

now.") (emphasis added). Plaintiff is, to some extent, still the master of his own claim. *See, e.g., Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 & n. 7, 107 S.Ct. 2425, 2429 & n. 7, 96 L.Ed.2d 318 (1987); 14A CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3702, at 22 (2d Ed.1985).

Consequently, the plaintiff's claim remains presumptively correct unless the defendant can show by a preponderance of the evidence that the amount in controversy is greater than the jurisdictional amount. The preponderance burden forces the defendant to do more than point to a state law that *might* allow the plaintiff to recover more than what is pled.[9] The defendant must produce evidence that establishes that the actual amount in controversy exceeds $50,000.

Our court has already said, in the instant case, that it is facially apparent that the damages rise to a level above $50,000. *De Aguilar I*, 11 F.3d at 57. As a result, despite the fact that the district court imposed the wrong burden, there is no question that the preponderance burden, had the district court applied it, easily would be met by these defendants. In fact, in accordance with the law of the case principle, this court is bound by what we held in *de Aguilar I*.

So, once a defendant is able to show that the amount in controversy exceeds the jurisdictional amount, removal is proper, provided plaintiff has not shown that it is legally certain that his recovery will not exceed the amount stated in the state complaint. Thus, once the defendant has pointed to an adequate jurisdictional amount, the situation becomes analogous to the "typical" circumstances in which the St. *Paul Mercury* "legal certainty" test is applicable: The defendant has established, by a preponderance, that federal jurisdiction is warranted. At this point, "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *St. Paul Mercury*, 303 U.S. at 289, 58 S.Ct. at 590.

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[9] Such a holding would render the jurisdictional amount all but meaningless in states with rules analogous to FED.R.CIV.P. 54(c). *See* 14A WRIGHT, *supra*, § 3725, at 426.

We emphasize that this is not a burden-shifting exercise. In light of *St. Paul Mercury*, plaintiff must make all information known at the time he files the complaint.

Plaintiff's "legal certainty" obligation might be met in various ways; we can only speculate, without intimating how we might rule in such case. Plaintiff's state complaint might cite, for example, to a state law that prohibits recovery of damages that exceed those requested in the *ad damnum* clause and that prohibits the initial *ad damnum* to be increased by amendment. Absent such a statute, "[l]itigants who want to prevent removal must file a binding stipulation or affidavit with their complaints; once a defendant has removed the case, *St. Paul* makes later filings irrelevant." *In re Shell Oil Co., 970* F.2d *355, 356* (7th Cir.1992) (per curiam).[10]

V.

The state complaint in this case was filed in Texas, which has the following procedural provision: "An original pleading . . . shall contain . . . (b) in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limits of the court." TEX.R.CIV.P. 47(b). Plaintiffs acknowledged during oral argument that their filing violated rule 47(b). Accordingly, there is no state provision

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[10] The Eleventh Circuit has expressed reluctance to allow state rules of procedure to determine when federal jurisdiction exists. *See Burns*, 31 F.3d at 1097. We note, however, the cases that we have cited, especially those mentioned by the *St. Paul Mercury* Court, which expressly reference state procedural rules in the context of removal.

Moreover, while the Eleventh Circuit fears the "inconsistent application of federal jurisdictional rules," we observe that the same "rule" will now hold throughout the circuit. The general principle is that plaintiffs will have to show that that they are bound irrevocably by their state pleadings in these situations. Certainly, plaintiffs who plead for specific damages and who are in states that have procedural rules binding them to their pleadings will satisfy their burden more easily. Others will have the same opportunity to avoid federal court but will have to choose another method to show their commitment to recovery below the federal threshold.

that limits the amount of damages plaintiffs are seeking, or can recover, to the amount they have asked for in the complaint, i.e., an amount not to exceed $50,000. In summary, therefore, a plaintiff, in a case for unliquidated damages, cannot, absent a further showing, avoid removal by pleading for damages under the jurisdictional amount where a state rule prevents such pleading and where defendants are able to show that it is facially apparent that the amount in controversy exceeds $50,000.

In the case *sub judice*, plaintiffs also attached to the original state court petition an attorney affidavit that purported to limit the amount of damages recoverable. The federal district court reasoned, however, that the plaintiffs could not effectively limit the amount of damages they could obtain unless they had the authority to bind the estates by limiting damages. In order to do so, they had to be the legal representatives or legal heirs of the estates.

On this issue, plaintiffs' initial argument is that Mexican law rather than Texas law should apply. Specifically, they assert that under Mexican law, they are the lawful heirs of the decedents and have lawful authority to limit the damages sought by the estates.

In a diversity action, a federal court must apply the choice-of-law rules of the state in which it sits. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021-22, 85 L.Ed. 1477 (1941). According to Texas law, "in all choice-of-law cases, except those contract cases in which the parties have agreed to a valid choice-of-law clause, the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue." *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex.1984).

Texas follows RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, which provides:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Furthermore, section 145 lists the factual matters that a Texas court will consider when applying section 6:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971); *Crisman v. Cooper Indus.*, 748 S.W.2d 273, 276-77 (Tex.App.—Dallas 1988, writ denied).

Furthermore, the application of the significant relationship test does not "turn on the number of contacts, but more importantly on the qualitative nature of those contacts as affected by the policy factors enumerated in Section 6." *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex.1979).

Defendants apparently relied upon only Texas cases when arguing before the district court that Texas law should apply, as plaintiffs did not argue that Mexican law should apply on this issue until they filed their motion to remand two months after removal. The district court, however, did address and reject the choice-of-law argument in its memorandum opinion, and we follow suit.

We will first identify all relevant contacts as a Texas court would. *Duncan*, 665 S.W.2d at 421. All defendants conduct business in Texas, the forum is Texas, and the underlying cause of action is based upon Texas law. All of the plaintiffs are from Mexico, all decedents were from Mexico, and the crash itself and the injuries took place in Mexico. There is no particular relationship between the plaintiffs and the defendants.

The matter at issue is whether Texas or Mexican law will be used to determine the extent of plaintiffs' authority to limit damage recoveries for the estates. As noted, plaintiffs plainly are seeking damages under the Texas Survival Statute.

This "particular substantive issue" has nothing to do with the actual alleged tort itself. *Duncan*, 665 S.W.2d at 421 (the law of the place with the "most significant relationship to the particular substantive issue will be applied to resolve that issue"). In other words, the choice-of-law question in this case is unrelated to the conduct and injury underlying the

cause of action in the same way that, for example, the choice of the substantive products liability law of one of the places would be.[11] *See, e.g., Perry v. Aggregate Plant Prods. Co.*, 786 S.W.2d 21 (Tex.App.—San Antonio 1990, writ denied) (products liability law of Indiana applies to conduct and injury occurring in Indiana); *Crisman* (products liability law of Florida applies to conduct and injury occurring in Florida).

The fact that the accident took place in Mexico, or that there was an accident at all, is fortuitous and simply not relevant to our particular choice-of-law decision. Rather, the important fact is that the plaintiffs chose to file a *suit* in Texas under Texas law. Whether the plaintiffs could effectively limit the damage recovery to the estates of the decedents relates more directly to the "procedural" aspects of the suit and not to the substantive portions of the cause of action.[12]

Mexico has no underlying interest in the application of its law to determine who can bring a cause of action or bind the estate in a Texas cause of action. Texas certainly has an interest in requiring those who seek to take advantage of Texas

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[11] Obviously, in a tort case, the locus of the conduct has a greater interest in seeing that its standard of care is applied, because it affects the way that parties tailor their conduct in that state. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145, cmt.d, at 417-18:

> Experience and analysis have shown that certain issues that recur in tort cases are most significantly related to states with which they have particular connections or contacts. So, for example, a state has an obvious interest in regulating the conduct of persons within its territory and in providing redress for injuries that occurred there. Thus, subject only to rare exceptions, the local law of the state where the conduct and injury occurred will be applied to determine whether the actor satisfied minimum standards of acceptable conduct and whether the interest affected by the actor's conduct was entitled to legal protection (see §§ 146- 147).

The particular issue in our case is more akin to the situation where "a court under traditional and prevailing practice applies its own state's rules to issue involving process, pleadings, joinder of parties, and the administration of the trial. . . ." *Id.* at 417.

[12] Strictly speaking, this is not a procedural issue; otherwise, the federal procedural rules would apply.

law to meet certain requirements. In addition, uniformity and predictability in Texas courts would be promoted when deciding who has the authority to pursue actions on behalf of estates. This is a false conflict, and Texas law applies. *See Duncan*, 665 S.W.2d at 422. In this situation, we have no doubt that a Texas court would choose to apply Texas law.

Plaintiffs originally claimed to be the personal representatives and legal heirs of the decedents' estates. Boeing's attempt to amend the Reich affidavit, and the conversations which followed, however, have called this claim into substantial doubt. In fact, plaintiffs appear essentially to have abandoned their claim as personal representatives and instead purport to be plaintiffs' legal heirs.

The plaintiffs can pursue their claims as the individual heirs of the estates under TEX.CIV.PRAC. & REM.CODE ANN. § 71.021 (Vernon's 1986). Legal heirs can sue on behalf of an estate if they allege that "there is no administration [of the estate] pending and no necessity for same and that they are the only heirs (or devisees) of the deceased." *Lozano v. Smith* 718 F.2d 756, 773 n. 38 (5th Cir. 1983); *see also Frazier v. Wynn*, 472 S.W.2d 750, 752 (Tex.1971); *Johnson v. Holly Farms, Inc.*, 731 S.W.2d 641, 647 (Tex. App.—Amarillo 1987, no writ).

Plaintiffs have not alleged any of these elements. They now argue that the district court erred in not requiring the defendants to offer evidence that the above elements could *not* be satisfied. Plainly, though, the rule is that the plaintiffs must affirmatively allege the above elements. *See Johnson*, 731 S.W.2d at 647.

In any event, defendants did offer evidence that the plaintiffs in this case are not the sole heirs. Forty-two persons alleged in *de Aguilar I* to be heirs of the decedents, as well as twenty minors, were dropped as plaintiffs. It appears that known heirs were deleted from this case because plaintiffs knew that they would not be able to limit the damage claim with these heirs as part of the action.[13] The one hundred "Doe" plaintiffs from the first action were also eliminated.

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[13] For example, a court must approve the limiting of a claim when minors are involved.

The inclusion of "Doe" plaintiffs in *de Aguilar I* suggests that the plaintiffs' attorneys were not aware of who all of the heirs were, and the plaintiffs have contended nothing that appears to change this circumstance.

In fact, plaintiffs' attorney acknowledged at oral argument that he does not represent all of the legal heirs. Defendants also argue that in a previous complaint, all of the present plaintiffs and all of the plaintiffs from *de Aguilar I* were included, and the plaintiffs still said that this was only a partial listing and that additional survivors would be named. Plaintiffs plainly have failed to meet the requirements of Texas law to limit the damages recoverable to the estates in this case. As a result, plaintiffs have failed to defeat removal jurisdiction.[14]

The judgment of the district court dismissing the complaint is AFFIRMED.

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[14] As this issue is dispositive, we find it unnecessary to address the issue of Boeing's third party complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

1:92-CV-537

August 11, 1993

ALMA TORREBLANCA DE AGUILAR, *et al.*,

Plaintiffs,

—VS.—

THE BOEING COMPANY, *et al.*,

Defendants.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS BASED ON FORUM NON CONVENIENS

CAME ON TO BE CONSIDERED Defendant The Boeing Company's motion for summary judgment and motion to dismiss on the basis of forum non conveniens, which are joined in by all other defendants and the third-party defendant. After reviewing the motions, the lack of response in opposition, and the pleadings of record, the court is of the opinion that the Defendants' motion to dismiss should be GRANTED and, therefore, the court does not reach Defendants' motion for summary judgment.

On June 8, 1993 this court denied Plaintiffs' motion to remand this case to Texas state court. On July 8, 1993 Boeing

filed a motion for summary judgment based on limitations and in the alternative a motion to dismiss Plaintiffs' claims based on forum non conveniens. Shortly thereafter, all other defendants, Delta Air Lines, Inc., the Goodyear Tire and Rubber Company, the B.F. Goodrich Company, Parker Hannifin Corporation, as well as the third-party defendant, Compania Mexicana de Aviacion, S.A., d/b/a Mexicana Airlines, joined in Boeing's motions.

This case has been dismissed by four other federal courts on the basis of forum non conveniens. In fact, these same plaintiffs were dismissed on that basis by Judge Howell Cobb of the Eastern District of Texas. *Torreblanca de Aguilar v. Boeing Co.*, 806 F. Supp. 139 (E.D. Tex. 1992). Judge Cobb found that direct estoppel precluded Plaintiffs from relitigating the forum non conveniens issue. In the alternative, Judge Cobb ruled the case would be dismissed on an independent determination under the doctrine of forum non conveniens. The court agrees with Judge Cobb's sound reasoning in the previous case. The court adopts that reasoning and results for this case. Because the court finds this is not a proper and convenient forum to try this case, it declines to rule on Defendants' motion for summary judgment.

IT IS, therefore, ORDERED that Defendants' Motion to Dismiss on the grounds of forum non conveniens is GRANTED, and this action is DISMISSED at Plaintiffs' cost.

SIGNED this the 11th of August, 1993.

RICHARD A. SCHELL

Richard A. Schell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

1:92-CV-537

June 8, 1993

ALMA TORREBLANCA DE AGUILAR, *et al.*,

Plaintiffs,

—VS.—

THE BOEING COMPANY, *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDERS DENYING MOTIONS TO REMAND AND MOTION TO STRIKE THIRD PARTY COMPLAINT OR ALTERNATIVELY SEVER THIRD PARTY ACTION

The Plaintiffs have filed a motion to remand, a supplemental motion to remand, and a motion to strike third party complaint or alternatively sever third party action. After reviewing the motions, the responses in opposition, the memoranda in support of the motions and responses, the pleadings of record and attached affidavits, the court is of the opinion that the motions should be DENIED.

BACKGROUND

On March 31, 1986 a Mexicana Airlines passenger jet crashed shortly after takeoff from a Mexico City airport. The crew and all passengers aboard the plane were killed. An investigation conducted by the Mexican government concluded that a tire explosion in the aircraft's wheel well resulted in an in-flight fire that disabled critical aircraft systems and caused the airplane to explode in flight.

Following the crash, relatives of Mexican citizens who perished in the crash filed several different lawsuits in several different state and federal courts in the United States, as well as Mexico. In each lawsuit filed in the United States, the action was either voluntarily dismissed by the plaintiffs, dismissed on the basis of foreign sovereign immunity, or dismissed on the basis of *forum non conveniens*. In fact, a similar lawsuit involving these same defendants and many of the same plaintiffs, was dismissed last year on the basis of *direct estoppel and forum non conveniens* by the Honorable Howell Cobb, also of the Eastern District of Texas. *Torreblanca De Aguilar v. Boeing Co.*, 806 F. Supp. 139 (E.D. Tex. 1992).

On November 5, 1992 relatives of some of the Mexican citizens who perished in the crash (hereinafter "Plaintiffs") filed this lawsuit in the 60th District Court of Jefferson County, Texas. The original petition in state court alleges negligence and product liability claims on behalf of Plaintiffs as personal representatives of the estates or as the legal heirs of the decedents pursuant to the Texas Survival Statute, TEX. CIV. PRAC. & REM. CODE ANN. § 71.021 (Vernon 1992). The petition charges acts of negligence and claims of product liability against The Boeing Company, The B.F. Goodrich Company, The Goodyear Tire and Rubber Company, Delta Air Lines, Inc., and Parker Hannifin Corporation (hereinafter "Defendants"). The petition, in an apparent attempt to defeat diversity jurisdiction, also alleges that Plaintiffs do not seek to recover more that $50,000 per decedent.

Defendants removed the lawsuit to this court. Defendants allege that after conducting an investigation of Plaintiffs' purported damages limitation, they have determined that not all indispensable parties are included as plaintiffs. Thus, Defendants allege the purported limitation is ineffective and cannot defeat diversity jurisdiction.

Plaintiffs then filed their motion to remand. Plaintiffs claim that the damages limitation set forth in their petition limits, to a legal certainty, the amount in controversy to less than $50,000. Plaintiffs also claim that whether they are the legal representatives of the estates of the decedents or the legal heirs entitled to bring these causes of action and limit the amount of damages sought, the case can and should be litigated in state court.

Boeing subsequently filed a third-party complaint against Mexicana Airlines. The third-party complaint alleges that any injuries or damages suffered by Plaintiffs were caused by the acts or omissions of Mexicana. Boeing claims that Mexicana is required to indemnify Boeing from and against any judgment arising out of Plaintiffs' claims against Boeing. Because Mexicana was owned by the government of Mexico, Boeing argues that this third-party complaint, independent of any diversity of citizenship argument, gives the court jurisdiction over this lawsuit pursuant to the Foreign Sovereign Immunities Act of 1976 (hereinafter "FSIA"), 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), and 1602-1611. Mexicana has answered the third party complaint, denying any liability and opposing Plaintiffs' motion to remand on the same basis of jurisdiction under the FSIA asserted by Boeing. Plaintiffs were then granted leave to file a supplemental motion to remand. In the supplemental motion to remand, Plaintiffs included an affidavit signed by their Mexican attorney wherein she states, without further proof, that each plaintiff is "an heir at law and/or personal representative of the respective decedents" and that she has been given explicit authority to limit their damages to $50,000. Plaintiffs have also moved to strike Boeing's third-party complaint alleging that the only reason Boeing has filed a claim against Mexicana is to pre-

vent the lawsuit from being remanded. Plaintiffs have moved in the alternative for a severance of the third-party claim.

ANALYSIS

I. Establishing Federal Jurisdiction

The burden of establishing that federal jurisdiction exists rests upon the party seeking to invoke it. *Gaitor v. Peninsular & Occidental Steamship Company*, 287 F.2d 252 (5th Cir. 1961) *citing Carson v. Dunham*, 121 U.S. 421, 7 S.Ct. 1030, 30 L.Ed. 992 (1887). To invoke the diversity jurisdiction of this court, it must be shown that the matter in controversy exceeds $50,000 and is between citizens of a state and citizens or subjects of a foreign state. 28 U.S.C. § 1332(a)(2). There is no dispute that complete diversity exists here. However, there has been much dispute over the amount in controversy. As the removing parties, Defendants bear the burden of showing that federal jurisdiction exists and must establish that the amount in controversy exceeds $50,000. *Id.* at 253.

II. Legal Certainty Test

The "legal certainty" test governs questions of jurisdictional amount. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845, 848 (1938). Exactly what a removing party must establish to a "legal certainty" to discharge its burden is unclear in the Fifth Circuit. A test was announced in *Kliebert v. Upjohn Co.*, 915 F.2d 142, 146-47 (5th Cir. 1990), *opinion vacated on grant of reh'g en banc*, 923 F.2d 47 (5th Cir.), *dism'd per settlement*, 947 F.2d 736 (5th Cir. 1991). If it had not been vacated, the panel decision in *Kliebert* would have required Defendants to establish to a legal certainty that a successful plaintiff would "recover at least the minimum jurisdictional amount." *Id.* However, a more relaxed standard, one used by Judge Cobb in denying a motion to remand in an earlier lawsuit concerning this same crash, only requires Defendants to prove that there is not a legal certainty that the claim is actually below the jurisdic-

tional amount. *See De Aguilar v. Boeing Co.*, 790 F. Supp. 693, 694 (E.D. Tex. 1992)(hereinafter "De Aguilar I"). In other words, the removing defendant must establish that there is some possibility that the plaintiff could recover over $50,000. Apparently, this is the rule in the Fifth Circuit. *Foret v. Southern Farm Bureau Life Insurance Co.*, 918 F.2d 534, 537 (5th Cir. 1990).

III. Amount in Controversy

Defendants argue that there is certainly a possibility that Plaintiffs could recover over $50,000 for a wrongful death cause of action. Defendants contend that Plaintiffs' damages limitation is ineffective and therefore the court should look to the recovery of typical wrongful death actions in order to determine the amount in controversy. Defendants point to Judge Cobb's ruling, in the earlier-mentioned denial of a motion to remand in *De Aguilar I*, in support of their contention that the amount in controversy is indeed to a legal certainty not less than $50,000. Judge Cobb, by looking to damage awards in similar cases, determined that these same plaintiffs were likely to recover more than $50,000 each if they recovered at all. *De Aguilar I*, 790 F. Supp. at 695.

Plaintiffs argue that they are the masters of their own pleadings and can determine the amount of damages they seek to recover. They argue that the attorney/client relationship controls whether Plaintiffs are bound by their petition and their attorneys' affidavits which state that Plaintiffs seek to recover less than $50,000. Plaintiffs also argue that Defendants have waived their ability to challenge Plaintiffs' authority to bring suit as personal representatives of the decedents' estates because they have not contested Plaintiffs' authority by a verified denial or plea in abatement as required by the Texas Rules of Civil Procedure. Finally, Plaintiffs contend that under Mexican law they are entitled as lawful heirs of the decedents to pursue these claims directly and have the authority to limit the damages sought by the decedent's estates to $50,000.

The court initially observes that generally speaking plaintiffs are the masters of their own pleadings and may determine how much money they seek to recover in a lawsuit. Recognizing this general rule, the Supreme Court has stated that plaintiffs may prevent removal by "resort to the expedient of suing for less than the jurisdictional amount." *St. Paul Mercury Indemnity Co.*, 303 U.S. at 294, 58 S.Ct. at 584, 82 L.Ed. at 851. However, this court recognizes that in order for Plaintiffs to effectively limit their damages they must have the right or authority to bring suit on behalf of the decedents' estates. Thus, the controlling issue is whether Plaintiffs are the legal representatives or the legal heirs entitled to bring suit on behalf of each decedent's estate and to bind the estate by limiting damages.

A. Defendants have not Waived their Ability to Challenge Plaintiffs' Authority to Bring Suit as Personal Representatives

Plaintiffs apparently contend that they bring this lawsuit as both personal representatives *and* as legal heirs. In a memorandum in support of the motion to remand Plaintiffs allege, "[I]n this case, the survival actions were brought by the heirs of decedents." (Plaintiffs' Memorandum In Support Of Motion To Remand, p. 11). However, in the same paragraph, Plaintiffs also argue that Defendants have waived their ability to challenge Plaintiffs' authority to bring suit as personal representatives of the decedent's estates. Plaintiffs apparently argue that under the Texas Rules of Civil Procedure one who purports to be suing as a personal representative need not prove his authority unless challenged by a plea in abatement or verified denial. It is Plaintiffs' position that because Defendants have not filed a plea in abatement or verified denial in this case they have waived their ability to attack the validity of Plaintiffs' authority as personal representatives.

Under the Texas Rules of Civil Procedure, a pleading setting up the matter that the plaintiff does not have the legal capacity to sue must be verified. TEX. R. CIV. P. 93(1); *See Theobold v. Pate*, 542 S.W.2d 460, 464-65 (Tex. Civ. App.—

Tyler, 1976, writ dism'd w.o.j.). In *Johnson v. Holly Farms of Texas, Inc.*, 731 S.W.2d 641, 647 (Tex. App.—Amarillo 1987, no writ), the Amarillo Court of Appeals ruled that plaintiffs suing under the Texas Survival Statute are not required to prove their authority to sue as personal representatives unless challenged by a plea in abatement or verified denial. The Federal Rules of Civil Procedure do not require the verification of the denial of a plaintiff's capacity to sue. The Federal Rules have eliminated any need to verify any pleadings, requiring only that the attorney sign his name to submitted pleadings. FED. R. CIV. P. 11. The court must determine, under the *Erie* doctrine, if the verified denial required under Texas law to contest Plaintiffs' authority to sue is a substantive right requiring compliance by Defendants or if the Federal Rules control the pleading requirements in this case.

This court ruled on a similar *Erie* doctrine issue in *Sneed Shipbuilding, Inc. v. Spanier Marine Corp.*, 125 F.R.D. 438 (E.D. Tex. 1989). In *Sneed Shipbuilding*, the court restated the rule handed down by the Supreme Court in *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), "[I]f the rules do conflict, *Hanna* mandates that the federal rule be applied, even if it changes the outcome, as long as the federal rule is valid in light of due process and the Rules Enabling Act." The court then determined that Federal Rule 11 did not violate due process or the Rules Enabling Act and was to be applied in pleadings situations where the conflicting Texas procedural rules were Texas Rules of Civil Procedure 93(10) and 185. *Id.* at 444.

The case now before the court is similar. The "right" in question in this case seems to be the right on the plaintiff's part to have the defendant swear to his pleading that disputes the plaintiff's authority to sue as a personal representative. Without repeating the analysis of *Sneed Shipbuilding*, the court finds that Defendants are only required to comply with federal pleading requirements and do not need to challenge Plaintiffs' authority to sue as personal representatives by a verified denial or a plea in abatement.

Plaintiffs have offered no proof, other than their Mexican attorney's affidavit, that they are the personal representatives of the respective estates. The court therefore cannot conclude that there is no possibility that the decedents' estates could recover more than $50,000.

B. Authority of Plaintiffs as Legal Heirs to Limit Damages Sought on Behalf of the Estate

Plaintiffs contend that under Mexican Law they are entitled as lawful heirs of the decedents to pursue these claims and have the authority to limit the damages sought by the decedent's estates to $50,000. Defendants allege that under Texas law all potential legal heirs to an estate are indispensable parties to a survival cause of action involving that decedent's estate. Defendants argue that because not all legal heirs are parties to this lawsuit, the damages limitation is ineffective and cannot defeat diversity jurisdiction. To resolve this issue, the court must determine whether Texas or Mexican law should control the extent of a legal heir's authority when bringing a claim on the behalf of a decedent's estate.

"In a diversity action in federal court, a district court is required to follow the choice of law rules of the state in which it sits." *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 249 (5th Cir. 1990) [*citing Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021-22, 85 L.Ed. 1477 (1941)]. Under Texas law, "in all choice of law cases, except those contract cases in which the parties have agreed to a valid choice of law clause, the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue." *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984). Thus, it is necessary for the court to determine whether Texas or Mexico has the most significant relationship to the ability and authority of a legal heir to sue on behalf of an estate seeking to recover under the the Texas Survival Statute.

In applying the most significant relationship test, the court must identify the relevant state contacts. The following contacts in the state of Texas are present in this case: all defen-

dants conduct business and are amenable to process, the forum providing the legal basis for the cause of action being brought by Plaintiffs is Texas, and the Texas courts system is being utilized to pursue these claims. The following contacts in Mexico are present in this case: all plaintiffs are from Mexico, all decedents were from Mexico, and the crash occurred in Mexico.

"The application of the most significant relationship approach to the resolution of choice of law questions does 'not turn on the number of contacts, but more importantly on the qualitative nature of those contacts as affected by the policy factors enumerated in Section 6 [of the Restatement].' " *Mitchell*, 913 F.2d at 249 [*citing Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979)].[1] Therefore, after identifying the states with relevant contacts, the court must identify the policies or governmental interests of each state in the controversy in question. *Id.*

In its analysis, the court confines itself to the issue of whether Texas or Mexican law should govern the authority of a legal heir when that heir is attempting to prosecute a survival claim on behalf of a decedent's estate. Given the fact that this case is brought in the state of Texas by foreign plaintiffs seeking to take advantage of the Texas Wrongful Death

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[1] Section 6 of the Restatement (Second) of Conflict of Laws provides,

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Statute, the court finds it hard to conceive of any overriding interest in applying Mexican law. On the other hand there are several significant reasons for applying Texas law.

Texas certainly has an interest in requiring that those seeking to assert claims in its courts meet certain requirements before asserting those claims. For instance, in situations such as this, the courts would spend an inordinate amount of time trying to determine a foreign country's laws regarding who has the authority to prosecute suits on behalf of an estate. Such an undertaking would be difficult and time-consuming. Requiring compliance with Texas law certainly promotes the efficiency of Texas courts in these matters. Further, it promotes the uniformity, predictability, and certainty of decisions dictating who has the authority to bring these causes of action and how they must bring them. Based upon these factors, the court believes that Texas courts would choose to apply Texas law.

In order to prosecute a survival cause of action on behalf of an estate as a legal heir, a plaintiff must establish three things under Texas law. The plaintiff must allege (1) that no administration of the estate is pending, (2) that no administration is necessary, and (3) that the plaintiff is the sole owner of the claim for damages which survived to the decedent's heirs, legal representatives and estate. *See Lozano v. Smith*, 718 F.2d 756, 773, n. 38 (5th Cir. 1983). Plaintiffs have alleged none of these elements.

The court notes that even if it were proper to apply Mexican law, Plaintiffs have failed to provide any support for their allegation that under Mexican law they would have the authority to pursue these claims and limit the damages sought to be recovered. While the court was unable to uncover much relevant Mexican law, it did research the statutes cited by Plaintiffs in a memorandum to the court. Plaintiffs cited the "Civil Code of Federal District arts. 1281-1294, 1599-1791" for the proposition that these heirs could make and prosecute these claims directly on behalf of the estate. The only relevant article in the Mexican Civil Code the court could find, in the wide array of statutes cited by Plaintiffs, was Article 1289

which reads, "[e]ach heir may dispose of the right which he has in the estate; but he cannot dispose of the things which constitute the estate." The court was not provided with or able to find any case law interpreting this provision, but the last half of Article 1289 may prevent Plaintiffs from binding an estate to a compromise without including all other persons who have an interest in the estate. Therefore, the court finds that Plaintiffs would be precluded from making a binding damages limitation under Mexican law.

CONCLUSION

The court finds that under Texas law Plaintiffs have not shown they have the authority to limit the damages sought to be recovered by the estates in this lawsuit. Further, even if Mexican law controlled the question of Plaintiffs' authority to limit damages, these plaintiffs have not shown they have that authority. Therefore, the court finds that the amount in controversy exceeded $50,000 at the time this lawsuit was removed and this court has jurisdiction.

IT IS, therefore, ORDERED that Plaintiffs' motions to remand are DENIED.

IT IS further ORDERED that Plaintiffs' motion to strike Boeing's third-party complaint, on the basis of fraudulent joinder to create federal jurisdiction, and in the alternative to sever the third-party complaint, in order to remand the main action, should also be DENIED.

SIGNED this the 8th of June 1993.

RICHARD A. SCHELL
Richard A. Schell
United States District Judge

Decedents:	Removed to U.S.D.C. San Antonio (Rodriguez)	Filed in U.S.D.C. San Antonio (Penasco)	Removed to U.S.D.C. Los Angeles (Penasco)	Removed to U.S.D.C. Chicago (Penasco)	Removed to U.S.D.C. Los Angeles (Estavillo)	Filed in Super. Ct. Seattle (Wolf)	Removed to U.S.D.C. Beaumont (Torreblanca I)
David Alberto Aguilar Chavez (Charvel)	X				X	X	X
Alejandro Altschuler Mena					X	X	X
Mariana Altschuler Mena					X	X	X
(Miuriam) (Miriam) Pilar Mena de Altschuler					X	X	X
Lourdes Arizmendi Otaegui					X		
Imra Avila (Alejandra Rosales)		X	X	X			
Miguel Avila (Villanueva)		X	X	X			
Jamie Avila (Rosales)		X	X	X			
Maria Guadalupe de la Caridad Barrios Aviles					X	X	X
DALIA (HERNANDES) BAUTISTA[1]		X	X	X	X	X	X
SARA BAUTISTA		X	X	X	X	X	X
(Sarai Hernandes Bautista) Maria Estela Bautista Abarca					X	X	X
Carlos Eduardo Bautista Calderon					X	X	X
Eduardo Calderon Zavala					X	X	X
Gloria Calderon Sotomayor de Bautista					X	X	X
Liliana Bautista Calderon					X	X	X
MARIA EMILIA BOURLON CUELLAR (Bourlon)		X	X	X	X	X	X
Ofelia Casarin Alcibar					X	X	X
Augustin Castro Diaz					X	X	X
Vincente Centeno, Jr.		X	X	X			
(Christina) Ivonne Centeno (Melgosa)		X	X	X			
Vincente (Rodrigo) Centeno (Melgosa)		X	X	X			
Fernando Conteros, (Martinez) M.D.		X	X	X			
Maria del Refugio Cortina Cepeadez (Cuellar)					X	X	X
Peter Miles Cowland					X	X	X
Uri Cukier Shveid					X	X	X
Golda Shveid de Cukier (Gold)					X	X	X
Abraham Cukier Shveid					X	X	X
Ilan Cuckier Shveid					X	X	X
Adela Gomez Daza Cortina					X	X	X
Palmira de la Fuente (del) Rivero					X	X	X

[1] Claims filed against Boeing on behalf of the decedents whose names are capitalized were voluntarily dismissed by notice under Fed. R. Civ. P. 41(a) in both the Penasco action in San Antonio and the Penasco action in Los Angeles. Accordingly, all claims of those decedents and their beneficiaries against Boeing have already been adjudicated on the merits pursuant to that rule.

Decedents:	Removed to U.S.D.C. San Antonio (Rodriguez)	Filed in U.S.D.C. San Antonio (Penasco)	Removed to U.S.D.C. Los Angeles (Penasco)	Removed to U.S.D.C. Chicago (Penasco)	Removed to U.S.D.C. Los Angeles (Estavillo)	Filed in Super. Ct. Seattle (Wolf)	Removed to U.S.D.C. Beaumont (Torreblanca I)
Yolanda Benitez de la O					X	X	X
Hector Arturo de la O Benitez					X	X	X
Hector Arturo de la O Maciel					X	X	X
Susan (Elizabeth) Dick (Showalter)					X		
Daniel Avila Dick							
Horacio (Al Fonso) Estavillo Laguna	X				X	X	X
Maria de la Luz Diaz de Estavillo	X				X	X	X
Horacio Estavillo Diaz	X				X	X	X
Pedro Garcia Beltethon, M.D.		X		X			
Alma (Lourdes) Garcia (Ruiz)		X		X			
Jesus Gomez Hernandez	X	X		X	X	X	X
Teresa Hernandez de Gomez	X	X		X	X	X	X
Maria De La Luz (Natividad) Ibarra (Garcia) (Becerril)		X	X	X			
Carlos Ibarra (Garcia)		X	X	X			
Sandra Ibarra (Garcia)		X	X	X			
Maria Del Pilar Enterria Gomez		X	X	X			
Manual Gomez (Enterria)		X	X	X			
Pilar Gomez		X		X			
Patricia Gomez (Enterria)		X	X	X			
Rudolfo Guadarrama		X		X			
Carlos Alberto Guadarrama					X	X	X
Laura Guara de Romero			X				
Laura Pazos Guara			X				
Maria Eugenia Pazo Guara			X				
Rosa Elena Guillen (Ortega de Rodriguez)		X	X	X			
Juan Rodriguez (Morales)		X	X	X			
ANA ROSA GUZMAN FLORES		X	X	X	X	X	X
David Jasqui Noah					X	X	X
Raquel Noah (Kamaji) de Jasqui					X	X	X
Sofia Jasqui Noah					X	X	X
Teresa Jasqui Noah					X	X	X
Jacobo Jasqui Dabbah (Derbah) (Debbah)					X	X	X
ELIZABETH LARTILLEUX		X	X	X	X	X	X
JAVIER LARTILLEUX (XAVIER)		X	X	X	X	X	X
ERICK LARTILLEUX (ERIC)		X	X	X	X	X	X
PIERRE LARTILLEUX		X	X	X	X	X	X
CHANTAL LARTILLEUX		X	X	X	X	X	X
VIRGINIA LARTILLEUX		X	X	X	X	X	X
PIERRE, JR. LARTILLEUX		X	X	X	X	X	X
NATALIA LARTILLEUX		X	X	X	X	X	X
AYMERIC (J.) LARTILLEUX		X	X	X	X	X	X
Carmen Anzaldua de la Llata					X	X	X

Decedents:	Removed to U.S.D.C. San Antonio (Rodriguez)	Filed in U.S.D.C. San Antonio (Penasco)	Removed to U.S.D.C. Los Angeles (Penasco)	Removed to U.S.D.C. Chicago (Penasco)	Removed to U.S.D.C. Los Angeles (Estavillo)	Filed in Super. Ct. Seattle (Wolf)	Removed to U.S.D.C. Beaumont (Torreblanca I)
(Maria) Guadalupe Melgoza (Alvarado) (Ma. Del) Carmen Melgoza (Alvarado)		X X	X X	X X			
Margarita del Toral Merino Monica Merino del Toral Margarita Merino del Toral Marcella Merino del Toral (Celia)	X X X X				X X X X	X X X X	X X X X
Rafael Michel (Jimenez)		X	X	X			
Rafael Mujica Alarcon		X	X	X			
Luis Enrique Ojeda Santana					X	X	X
Rita (Maria Del Carmen Raigosa) Ortiz		X	X	X			
Rita Ortiz Villa Vicencio							
Rita Ortiz De Guadarrama							
(Ma. De La) Paz Ortiz (Villa Vicento Vda De. Raigosa)		X	X	X			
Nicolasa Ortiz		X	X	X			
Rosa Ortiz (De Velasco) Jose Ortiz (Margarito Velasco Ruiz)		X X	X X	X X			
Emma Ortiz (Banda)		X	X	X			
Liceo Palacios		X	X	X			
Lizeth Palacious Rodriguez							
Maria De La Luz Guadalupe Puente De Pardes							
Ma. De Lourdes Parades Puente							
Liliana Parades (Puente) Lulu (Maria) Parades		X X	X X	X X			
Maria Pardes (Espinosa)		X	X	X			
Pedro Ramirez Hernandez Patricia (Guadelupe) Martinez De Pardo (Tocaven) Rafael Jacobo Pardo (Martinez) Estrado		X X X	X X X	X X X			
Rafael Jacobo Pardo Patricio Pardo (Martinez) (Rafael) Javier Pardo (Martinez) Barbara Pardo (Martinez)		X X X X	X X X X	X X X X			
Sergio (Vincent) Paredes (Fernandez)		X	X	X			

Decedents:	Removed to U.S.D.C. San Antonio (Rodriguez)	Filed in U.S.D.C. San Antonio (Penasco)	Removed to U.S.D.C. Los Angeles (Penasco)	Removed to U.S.D.C. Chicago (Penasco)	Removed to U.S.D.C. Los Angeles (Estavillo)	Filed in Super. Ct. Seattle (Wolf)	Removed to U.S.D.C. Beaumont (Torreblanca I)
Katya Kohn Paz de Hernandez (Catia) (Katia)					X	X	X
Jorge Pazos			X				
Angel Carlos Penasco Espinosa		X	X	X			
Ana Leticia Perez Neyra		X	X	X			
Sylvia Rivera Perez de la Torre					X	X	X
Maria Isabel Domenge Munoz		X	X	X			
HIGINIO PIERDANT QUIROZ		X	X	X	X	X	X
Aida Ella Domenge De Pierdant		X	X	X			
Aida Pierdant Domenge		X	X	X			
Higinio Pierdant Domenge		X	X	X			
Sofia Pierdant Domenge		X		X			
Monica Pierdant		X	X	X			
Roberto Pinon Perez					X	X	X
Haydee Lorenzo de Pinon (Lozano)					X	X	X
Amelia Florencia Quesnel Galvan					X	X	X
Philip Lewes Piaget Rhorer (Lewis)					X	X	X
John Michael Rivaud	X				X		
Yayone Rivaud	X				X		
Jonathan Mikel Rivaud	X				X		
Peter Julien Rivaud	X				X		
Eduardo Ricardo Robinson Castro					X		
Maria Teresa Castro de Robinson					X		
Alberto Luis Robinson Rendon					X		
Gaspar Robles (Ramirez)		X	X	X			
Maria Rodriguez Zaldivar (MA Gabriela)	X				X	X	X
Anabel Rodriguez Zaldivar	X				X	X	X
Imelda Zaldivar Moreno de Rodriguez	X				X	X	X
(Maria Del) Pilar Rojas (Burgos)		X	X	X			
Genoveva Romero Vda de Baumgarten (Baumgarten de Baumgarten)					X	X	X
Julia Diaz Cobian de Rosales	X				X	X	X
Natael Gerardo Rosales Flores	X				X	X	X
Enrique Alejandro Sosa Rojas					X	X	X
Frederico (Javier) Ysunza Brena					X	X	X

Decedents:	Removed to U.S.D.C. San Antonio (Rodriguez)	Filed in U.S.D.C. San Antonio (Penasco)	Removed to U.S.D.C. Los Angeles (Penasco)	Removed to U.S.D.C. Chicago (Penasco)	Removed to U.S.D.C. Los Angeles (Estavillo)	Filed in Super. Ct. Seattle (Wolf)	Removed to U.S.D.C. Beaumont (Torreblanca I)
Augustin Ytuarte (Salazar)	X				X	X	X
(Maria Esther Juliana) Mercedes Zaldivar (Perez)		X	X	X			
Marisa Zaldivar		X		X			
Maria Esther (Juliana) Zaldivar (Perez)		X	X	X			
Dolores (Maritza) Paus Zaldivar			X				
Ricardo Zuniga Escobar		X	X	X			
TOTALS	20	72	69	72	78	69	69

Supreme Court, U.S.
FILED
SEP 19 1995
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No. 95-102

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER, 1995

ALMA TORREBLANCA DE AGUILAR, ET AL.,
Petitioners,

v.

THE BOEING COMPANY, ET AL.,
Respondent.

Reply Brief in Support of Petition for Writ of Certiorari

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Petitioners

25 pp

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No. 95-102

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER, 1995

ALMA TORREBLANCA DE AGUILAR, ET AL.,
Petitioners,

v.

THE BOEING COMPANY, ET AL.,
Respondent.

Reply Brief in Support of Petition for Writ of Certiorari

Petitioners Alma Torreblanca de Aguilar, et al., file this Reply Brief in Support of Petition for Writ of Certiorari to urge the Court to grant certiorari and review the question presented in the Petition. Respondent has filed its Brief in Opposition to the Petition for Writ of Certiorari. Respondents have not demonstrated, nor can they, that the

Fifth Circuit was correct in its holdings in the proceedings below.[1] Petitioners file this Reply to further explain the necessity that this Court reinforce its holding in Saint Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294 (1938). This Reply brief contains one Reply point of several parts.

I. THE DISTRICT COURT AND FIFTH CIRCUIT IN THIS CASE ERRED IN RESPECTIVELY ASSERTING AND UPHOLDING REMOVAL JURISDICTION AND DISTINGUISHING RED CAB.

A. Federal jurisdiction is limited.

Federal jurisdiction based on diversity of citizenship has always been, and should continue to be extremely limited. See, Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994); Caterpillar, Inc.v. Williams, 482

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[1] The Fifth Circuit's opinion is faithfully reproduced at App. C., A30 to A77. The opinion is reported at 47 F.3d 1404

U.S. 386, 391 & n.7 (1987); Wright & Miller, 14A FEDERAL PRACTICE & PROCEDURE § 3702 (citing Red Cab in support of the proposition that plaintiff is the master of his or her own claim; if plaintiff chooses to ask for less than the jurisdictional amount, only the sum actually demanded is in controversy).

There is a strong presumption against permitting a defendant to remove an action from a state court to a federal district court. Burns, 31 F.3d at 1095. In Burns, the Eleventh Circuit pointed out that removal statutes are construed narrowly and against federal removal jurisdiction. Id. Defendant's right to remove and plaintiff's right to choose his or her forum are not, the court stated, of equal weight. Where plaintiff and defendant disagree about jurisdiction, the federal court should always err towards remand. Id.; see also, Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995) (citing Gaus v. Miles, 980 F.2d

564, 567 (9th Cir. 1992)).[2]

B. The Red Cab decision sets out the law.

In Red Cab, this Court recognized that basic federal jurisdictional approach in holding that where a plaintiff does not desire to try his or her case in the federal court, he or she may resort to the expedient of suing for less than the jurisdictional amount. When that occurs, defendant will not be allowed to remove. Red Cab, 303 U.S. at 294. This plain statement by this Court also acknowledged the related tenet that it is the plaintiff's right to select his or her forum in almost all instances. Burns, 31 F.3d at 1095.

C. The Defendant's burden is a heavy one.

The Burns court also stated that the burden of proof upon the defendant to dispute a plaintiff's express claim to

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[2] The Laughlin case, as discussed in the Petition for Writ of Certiorari, should soon be, if it is not already, on its way up seeking Writ of Certiorari in this Court. It too is inconsistent with the Fifth Circuit's opinion in this case and is another example of the need for this Court to clarify the law in this area.

an amount beneath the jurisdictional limit should be a heavy one. Id. (citing Boyer v. Snap-on Tools Corp. 913 F.2d 108, 110-112 (3rd Cir. 1990), cert. denied, 498 U.S. 1085 (1991)).

D. The test is objective rather than subjective.

The Burns court also stressed that federal courts should remember that every attorney is an officer of the court and when he or she signs a pleading, he or she is exercising his or her duty of candor to the tribunal. Id. The court went on to state:

> So, plaintiff's claim, when it is specific and in a pleading signed by a lawyer, deserves deference and a presumption of truth. We will not assume-unless given reason to do so-that plaintiff's counsel has falsely represented, . . . the value of his client's case. Instead, we will assume that plaintiff's counsel best knows the value of his client's case and that counsel is engaging in no deception. We will further presume that plaintiff's counsel understands that, because federal removal jurisdiction is in part determined by the amount of damages a

> plaintiff seeks, the counsel's choices and representations about damages have important legal consequences and, therefore raise significant ethical implications for a court officer.

Id. (emphasis added). The Eleventh Circuit later pointed out that it would not follow the Fifth Circuit's opinion in Kliebert v. Upjohn Co.,[3] which it had cited as persuasive in its reasoning, to the extent that it required defendant to prove plaintiff's bad faith or dishonesty in order to prevail on the issue of whether a plaintiff could actually recover more than the express amount claimed and more than the jurisdictional minimum. Id. at 1096.

Rather, the Eleventh Circuit, we respectfully submit, correctly held that the standard was an objective one. [P]laintiff's or plaintiff's counsel's subjective intent in

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[3] 915 F.2d 142 (5th Cir. 1990), vacated for reh'g en banc, 947 F.2d 47 (5th Cir.), appeal dism'd per stipulation of settlement. 947 F.2d 736 (5th Cir. 1991).

drafting the prayer is not the true issue. Id. This standard makes the most sense and is antithetical to the approach taken by the Fifth Circuit. The objective approach taken by the Eleventh Circuit minimizes federal diversity jurisdiction as Congress intended. The bad Faith approach taken by the Fifth Circuit which permits defendants into federal court upon the minimalist showing of a preponderance would unacceptably broaden diversity jurisdiction. Wright & Miller, 14A FEDERAL PRACTICE AND PROCEDURE §§ 3702, 3725 (asserting, prophetically in light of the Fifth Circuit's opinion in this case, that adopting lower standards for defendants who wish to demonstrate that plaintiff's claim is actually worth more than the jurisdictional minimum would render those minimums meaningless).

E. State ad damnum rules cannot control.

Further, the Burns court expressed concern for

precisely the problem caused by the Fifth Circuit's opinion in this case. TEXAS RULE OF CIVIL PROCEDURE 47(b) states that:

> An original pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim, shall contain (b)in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limits of the court.

The Burns court made clear that given the existence, and indeed, prevalence, of ad damnum clause requirements such as that of Texas and Alabama, where plaintiffs are only permitted to state that the damages claimed are in excess of the jurisdictional minimum, the state procedural rule will determine when federal jurisdiction exists. Id. at 1096.

The court continued by expressing its fear that such an application and interpretation of state procedural rules would lead to the inconsistent application of federal jurisdictional rules. The court refused to construe the

federal removal statute in such a way or promote such inconsistency. Id.[4]

The approach taken in Burns is more aligned with the concept of federal uniformity than that concocted and espoused in the Fifth Circuit's opinion in this case.

The Fifth Circuit, in addressing the issue discussed by Burns concerning the interplay of state procedural rules and federal jurisdiction had this to say:

> The Eleventh Circuit has expressed reluctance to allow state rules of procedure to determine when federal jurisdiction exists. . . . We note, however, the cases that we have cited, especially those mentioned by the St. Paul Mercury (Red Cab) Court, which expressly reference state procedural rules in the context of removal.

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[4] The Eleventh Circuit also stated, in a footnote, that Congress had already contemplated situations where the Plaintiff can and will intentionally avoid federal jurisdiction. Burns, 31 F.3d 1092, 1097 n.12 (discussing the joinder situation under 28 U.S.C. § 1446(b)). Thus, the court concluded, Congress would not find the result in Burns, that Plaintiff could eventually increase its damage demand, offensive. In the present case, there is not even the possibility of increased damages that Burns contemplated because of the cap volunteered by Petitioners.

> Moreover, while the Eleventh Circuit fears the inconsistent application of federal jurisdictional rules, we observe that the same rule will now hold throughout the circuit. The general principle is that plaintiffs will have to show that they are bound irrevocably by their state pleadings in these situations. Certainly, plaintiffs who plead for specific damages and who are in states that have procedural rules binding them to their pleadings will satisfy their burden more easily. Others will have the same opportunity to avoid federal court but will have to choose another method to show their commitment to recovery below the federal threshold.

de Aguilar v. Boeing Co., 47 F.3d 1404, 1412 n.10 (5th Cir. 1995). This rule is almost completely nonsensical. It is impossible to see why the Fifth Circuit is willing to permit the various procedural rules of the three states within its jurisdiction to determine federal jurisdiction in light of the well established federal principles of uniformity. In addition, this is plainly in stark contrast to the Eleventh Circuit's approach in Burns.

It is unclear why the Fifth Circuit has chosen a rule which will increase federal jurisdiction at the expense of decades of jurisprudence favoring both the plaintiff's choice of forum and limited diversity and removal jurisdiction. Yet this is what they have done.

Indeed, the facts of this present case fit well into the fact pattern in Burns. The Fifth Circuit, in its opinion, states that Petitioners claim that damages are capped at $50,000 exclusive of interest and costs is to be treated as more like a claim for one sum rather than a claim for an unlimited or an unspecified amount of damages. . . . Therefore, the claim that damages are capped at $50,000 exclusive of interest and costs should be viewed in the same light as the claim for $45,000 in Burns. That is, using the preponderance of the evidence test, and placing the burden of proof exclusively upon the defendant, the district court should view an irrevocable cap on damages, such as the one

in place in the instant case, in the same manner as did the Burns court. The underlying state procedural rule should not play a role, in the interest of federal uniformity and limited jurisdiction.

Moreover, even if the underlying state jurisdictional rule is considered, its violation by Petitioners in this case is not fatal to their attempt to limit their damages claim. Respondent makes much of the fact that Petitioners have violated Rule 47(b) in stating a numerical measure of damages as opposed to simply stating that the damages are within the jurisdictional limit of the court, as stated in the rule.

The rule, as it is written, plainly does not contemplate the eventuality of removal. Respondent argues that given this Rule, Petitioners attempt to voluntarily cap damages pre-removal and pre-answer is meaningless.

The response to this argument is set forth by the

court in Burns. That is, state jurisdictional rules should not control federal jurisdiction. However, another argument is that, given the mechanism of removal where defendants are not required to file a responsive state court pleading, and are only required to file notice of removal, in a state such as Texas, the Plaintiff would never have the opportunity to effectively challenge defendant's estimation of its damages.

The Texas rule plainly contemplates a state court responsive filing, and in doing so, demonstrates its true purpose. The last paragraph of the rule states that:

> Relief in the alternative or of several different types may be demanded; provided, further, that upon special exception the court shall require the pleader to amend so as to specify the maximum amount claimed.

TEX.R.CIV.P. 47 (emphasis added).

In Texas, a special exception is a pleading filed by defendant, or one responding to a cross-claim or counterclaim or the like, which is designed to ascertain the

opponent's claim with greater clarity. The two provisions of Rule 47 therefore go hand in hand. The party initiating the claim is required to plead its damages generally, and the opponent is then required to specially except if it wants to learn the maximum amount of damages claimed by Plaintiff. In the removal setting, this is not possible.

Therefore, Plaintiff has no opportunity to specify its damages in the removal situation, and, under the Fifth Circuit's analysis and interpretation of Red Cab, plaintiffs from states with rules like Texas' are at the mercy of defendants who seek the benefits of federal courts. This is the reason that the Burns court ruled the way it did with respect to the various state jurisdictional rules. They do not contemplate anything beyond state court proceedings.

This is not they way it is supposed to work. The burden has been shifted by the Fifth Circuit. Red Cab has been twisted and dissected beyond recognition.

This Court, we respectfully argue, should make clear that the Burns analysis is the law, and that federal jurisdiction is uniformly applied, and minimized. The burdens of proving federal jurisdiction should not be shifted to plaintiffs in some states and not others.

It is said that hard cases make bad law. The Fifth Circuit, in an effort to deny an American forum to plaintiffs where, given the exercise of f.n.c., the district court's jurisdiction over defendant's is presumed, has gone far out of its way to shift the burdens placed upon parties to removal. Plaintiffs in states with ad damnum provisions such as Texas will be in a Catch-22, and in diversity settings, will almost always be removed by the defendant to federal court under the Fifth Circuit's analysis. If they plead a specific figure of damages, they will be accused of bad faith. If they do not, they will almost certainly be removed. Surely the Eleventh Circuit's approach is

preferable, and is in fact, the law.

F. Defendant/Respondent has the burden to prove all underlying facts supporting jurisdiction.

In Gaus v. Miles, Inc., 980 F.2d 564, 566-67 (9th Cir. 1992) the court stated that:

> If it is unclear what amount of damages the plaintiff has sought, . . . then the defendant bears the burden of actually proving the facts to support jurisdiction, including the jurisdictional amount.

Id. at 567 (emphasis added). In other words, defendant must set forth the underlying facts supporting the federal court's jurisdiction. Respondent has set forth no such facts in this case. Instead Respondent relies upon prior rulings in this case and estoppel arguments. Further, Respondent has offered nothing in settlement of this case. It is disingenuous when Respondent suggests that damages are in excess of $50,000 but has not offered a cent in settlement.

Additionally, Respondent suggests that it is

Petitioners burden to set forth the facts supporting its authority to limit the claims in this case to below the jurisdictional minimum for diversity jurisdiction. Respondent cites case law in support of the proposition that proof of a matter of avoidance is the burden of the party asserting it irrespective of who has the burden on the underlying issue. Respondent's Opposition at 14. Clearly those cases did not contemplate the removal situation where, as stated above, the removing party unquestionably has the burden to prove the underlying facts which support jurisdiction. Additionally, this is not an issue of avoidance. Rather, Petitioners have set forth the facts regarding their limited damages, and it is Respondents who, at all times, should have the burden of setting forth facts which disprove the limit on those damages.

CONCLUSION

The Fifth Circuit and the District Court in this case

have interpreted this Court's Red Cab opinion in a manner that is contrary to the most basic principles of federal jurisdiction. Further, this holding serves to highlight the wide disparity between the circuits on the issue of who is preferred in the choice of forum analysis; plaintiffs, or defendants. The circuits have handed down opinions that are directly at odds, and also opinions of every shade in between on this issue. This Court, we respectfully urge, should take this opportunity to clarify its holding in Red Cab and quell this uncertainty.

The Eleventh Circuit, in Burns, has made clear that the plaintiff is favored, even in situations rife with potential for abuse.[5] In contrast, the Fifth Circuit, in a thinly veiled attempt to counteract the Texas Legislature's decision to do away with f.n.c., have made bad law. As a result,

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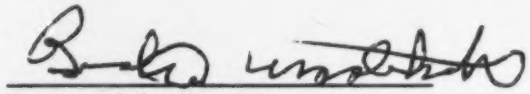
[5] See Burns, 31 F.3d at 1097 n.12.

Petitioner's have been denied their choice of forum, to which they were rightfully entitled.

As a further result, Petitioners who made valid claims under the jurisdictional limit are being subject to these collateral attacks concerning their ability to limit their claims for damages which were never intended by Congress in creating removal jurisdiction. Petitioners respectfully ask this Court to overturn the lower courts' opinions in this case in favor of the Eleventh Circuit's approach.

Respectfully submitted,



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